80-1107

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

No.

WILLIAM CAULFIELD, et al.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, JOSEPH CALIFANO, JR., DAVID TATEL, RONALD ROSS, THE COALITION OF CONCERNED BLACK EDUCATORS, and GORDON AMBACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?

2. In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's actions in carrying out its

provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?

3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due process of law?

The aforesaid constitutional questions of law were presented in the complaint, at pages A199 to A202 of the Joint Appendix in the plaintiffs' appeal in this case to the United States Court of Appeals for the Second Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed September 22, 1980, which affirmed the judgment of the United States District Court for the Eastern District of New York, dated

July 17, 1979, which dismissed the complaint after a trial before the Court (Weinstein, J.) without a jury.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit were filed in that Court on September 22, 1980, and are not yet officially reported. A copy of such opinion is printed beginning at page 1a of the Appendix herein.

A prior decision and opinion by the Court of Appeals, dated September 5, 1978, reported in 583 F.2d 605 (2d Cir. 1978), printed beginning at page 16a of the Appendix herein, affirmed the denial of plaintiffs' motion for a preliminary injunction against the collection of racial and ethnic data by the defendant Board of Education ("the Board"); and it reversed an order of the District Court

which remanded this case to the federal Department of Health, Education and Welfare ("HEW"), for further proceedings in which plaintiffs would be permitted to participate; and it remanded the case to the District Court for hearing on the merits of plaintiffs' allegations that a Memorandum of Understanding between HEW's Office of Civil Rights ("OCR") and the Board, dated September 7, 1977, and the Board's actions in carrying out its provisions, unconstitutionally denied to the plaintiffs the equal protection of the laws, and deprived them of liberty and property without due process of law.

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, filed September 22, 1980, is timely made within 90 days of the filing of such

judgment.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to

racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?

2. In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's actions in carrying out its provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?

3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due

process of law?

The aforesaid constitutional questions of law were presented in the complaint, at pages A199 to A202 of the Joint Appendix in the plaintiffs' appeal in this case to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

On November 4, 1976, OCR wrote to the Board that the Board "is in non compliance" with Title VI of the Civil Rights Act of 1964, and with Title IX of the Education Amendments Act of 1972, because the Board had "denied minority teachers full access to employment opportunity" by using racially discriminatory procedures for testing, selecting and appointing teachers; by using racially identifiable employment pools which restricted the selection and appointment of blacks and Hispanics as teachers; by

assigning teachers to its 900 elementary schools, junior high schools and high schools by procedures and policies which placed mostly black teachers in public schools which had a majority of black students, Hispanic teachers in public schools which had a majority of Hispanic students, and white teachers in public schools which had a majority of white students (A263-300).

The Board investigated OCR's allegations, and on April 22, 1977, the Board wrote a "Response" to OCR, in which the Board denied non compliance with the 1964 Civil Rights Act, and with other federal statutes (A301-360).

The Board wrote in its "Response" that its procedures for hiring new teachers were prescribed by State statutes, which prescribed two different hiring methods, namely: Open competitive civil service examinations for license and appointment of teachers from eligible lists

of those candidates who passed such examinations, and who were placed on such eligible lists in the order of their grades or marks in such examinations, the candidate receiving the highest grade being ranked first on the eligible list, and the remaining candidates being ranked behind him in the order of their grades or marks in such examination.

Such eligible lists are dated on the date on which they are established. They remain in effect for up to four years, unless sooner exhausted by appointment of eligibles therefrom, or unless superseded by establishment of an eligible list from a subsequent examination.

An "alternative hiring method" consisted of hiring persons as teachers either by taking them "out of rank order" from existing dated, rank order eligible lists, or by establishing the appointee's

qualifications as a teacher if he or she passed a non competitive National Teachers Examination ("NTE") (A306-313).

In Rubinos v. Board of Examiners, (74 Civil 2240, GRIESA, J., S.D.N.Y.), the District Court denied a preliminary injunction to restrain the Board from hiring new teachers from dated, rank order eligible lists established as a result of open competitive civil service examinations (A312-313).

In Aspira v. Board of Education (72 Civil 1002; S.D.N.Y.), a consent decree provided that the Board shall give bi-lingual education in the Spanish language to Hispanic students who are not able to understand the English language. For this purpose, the Board hired, without competitive examination, persons whose native language was Spanish; and the Board assigned such bi-lingual teachers to pub-

lic schools attended by large numbers of Hispanic students (A313-314).

The alternative hiring method may only be used to appoint teachers to those elementary and junior high schools in which students scored in the lower 45th percentile on comprehensive annual reading tests given by the Board to all elementary and junior high school students in New York City (A306-310).

New York statutes provide that no appointment of teachers may be made from a dated, rank order eligible list until all prior eligible lists have been exhausted, or have expired (A312-313).

The Board wrote that in 1970-1971, 5,625 teachers were from minority groups. By 1974-1975, their number had increased to 7,316, an increase of 40% (A-309-310).

At the trial, the intervenor-plaintiffs, Albert Shanker, et al.,

(United Federation of Teachers, "UFT"), presented evidence that by 1979, the number of minority teachers in New York City's public schools had increased to more than 16% of all teachers; and that such percentage closely corresponded to the number of young minority college graduates in the metropolitan area seeking employment as teachers in New York City's public schools (A780-A939).

UFT also presented evidence at the trial that the Board expended more money per student, and gave more teaching time, effort and facilities to teaching black and Hispanic students than to teaching white students, by giving to such minority students smaller numbers of students per class, tutors, paraprofessionals, visual aids and other special equipment and facilities (A780-A-939).

The Board's Special Circular No.

30-R, dated December 8, 1977, repeated provisions in its 1972-1973 circular, reading:

> "All persons interested in filling supervisory vacancies shall be given equal and fair consideration by the screening and interviewing committees. There shall be no discrimination because of age, race, creed, color, national origin, sex, handicap, union or non-union affiliation. All action shall conform to public law."

The Board also wrote in its "Response" that the alternative hiring method "has contributed to the concentration of minority staff in predominantly minority schools" (A313); and it disputed OCR's allegations that the Board assigned "teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students" (A263), saying that OCR's own statistics, and independent analysis, do not support such allegations (A270-271).

Memorandum of Understanding, September 7, 1977

On September 7, 1977, the Board and OCR signed a "Memorandum of Understanding", which provided, in part (A361-A364):

> "1. Not later than September of 1979, the teacher corps of each District in the system will reflect within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.
>
> 2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.
>
> * * *
>
> 6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 of this Memorandum and other efforts taken or to be taken by the Board, the

> Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool."

In September, 1977, the Board implemented and carried out the above-quoted provisions of the Memorandum of Understanding by rehiring teachers whom it had laid off for reasons of economy, and assigning rehired white teachers to schools which had a majority of black students, and assigning rehired black teachers to schools which had a majority of white students (A939-1058).

Rehired black and Hispanic teachers were given a choice to pick teaching assignments from a box containing the names of schools which had a majority of white students (A939-1058).

Rehired white teachers were given a choice to pick teaching assignments from

a box containing the names of schools which had a majority of black students (A939-1058).

More than 4,000 white teachers declined to be rehired and assigned to black schools; and 800 rehired white teachers who accepted assignment to black schools later resigned. The Board also offered employment to 10,000 persons on open competitive eligible lists, most of whom declined to accept employment as teachers assigned to black and Hispanic schools (A939-1058).

In making such assignments of rehired teachers, the Board carried out a policy which it said in its "Response" it would carry out, as follows (A324):

> "2. Teachers and supervisors on preferred lists who are recalled are to be assigned by the Division of Personnel to foster the integration of minority and non-minority personnel and to correct any disparities of experience, salary and educational level in the distribu-

> tion of personnel. There are now thousands of teachers on preferred lists. As vacancies occur and teachers are recalled, they are assigned by the Division of Personnel. In making these assignments, integration of staff and equalization of experience, salary and education will be determining factors."

Racial Census

On October 17, 1977, the Board distributed to Community School Boards, and to public schools, its Special Circular No. 18, 1977-1978, relating to "Annual School Census", with forms for entering thereon information about race and ethnicity of teachers and school supervisors. That circular stated, in part:

> "This form will collect ethnic composition summarized by grade from the 'C' form. In addition, this form will also collect staff ethnic composition data summarized by position title as of October 31, 1977." (Emphasis supplied.)

In October, 1978, the Board directed Community School Boards to collect and to

enter on similar forms similar racial census information about teachers; and the Board suspended the plaintiff, Community School Board 26, for refusing to collect such information.

Prior Proceedings

The complaint in this action was filed in the District Court on October 31, 1977. Thereafter, UFT, by Albert Shanker, its president, and CSA (Council of Supervisors and Administrators, a labor union), by Theodore Elsberg, its president, intervened as intervenor-plaintiffs, and served complaints. Maria Banks and four others intervened as "CONCERNED BLACK EDUCATORS", intervenor-defendants, and served answers to the complaints, as did Ronald Ross, an intervenor-defendant, who served answers to the complaints.

Plaintiffs made a motion for summary judgment, or for a preliminary injunction.

The District Court (WEINSTEIN, J.) denied both motions. Plaintiffs appealed from the denial of a preliminary injunction.

By judgment dated March 15, 1978, the District Court, sua sponte, annulled the Memorandum of Understanding, and remanded this case to HEW and OCR for an administrative hearing; and the District Court certified under 29 U.S.C. section 1292(b) that there is a controlling question of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal will materially advance the ultimate termination of the litigation.

By leave of the Court of Appeals, plaintiffs, intervenor-plaintiff Elsberg, the Federal defendants, and Ronald Ross, intervenor-defendant, appealed from the judgment annulling the Memorandum of Understanding.

On September 5, 1978, the Court of Appeals affirmed the order of the District Court which denied plaintiffs' motion for a preliminary injunction; and it reversed the judgment which annulled the Memorandum of Understanding, and remanded the case to the District Court for further proceedings (583 F. 2d 605).

The trial of this case began on March 30, 1979. Evidence was presented on several dates until July 3, 1979, when the trial concluded. Final judgment dismissing the complaint was entered on July 17, 1979, and a written opinion was filed on August 27, 1979.

Plaintiffs, UFT, CSA and Ronald Ross, appealed from the judgment.

Thereafter, CSA withdrew its appeal by stipulation.

On September 22, 1980, the Court of Appeals affirmed the judgment dismissing the Complaint.

THE DECISIONS BELOW

I.

The District Court (WEINSTEIN, J.) said that OCR had jurisdiction over the employment practices of the Board, because OCR's regulations empower it to take action against employment practices of recipients of Federal grants of money, under the "infection" theory of jurisdiction, where the recipient's employment practices have a discriminatory effect upon direct beneficiaries of Federal grants of money, such as the students in this case (A57).

The Court also said that the prior decision of the Court of Appeals (583 F. 2d 605), was that the Memorandum of Understanding between the Board and OCR was voluntary; that there was an analogy between the agreement between the Board and OCR in this case, and the agreement

between employer and labor union in United Steelworkers v. Weber, 443 U.S. 193 (1979) (A57-58); and that the issue is whether the Board and OCR had a reasonable basis for believing that the Board's employment practices may be racially discriminatory, and whether the remedial measures agreed to in the Memorandum of Understanding were reasonable in view of the perceived liability (A58-59).

The Trial Court said (A83-84):

> "[I]t is both unnecessary and inappropriate to decide whether or not the Board practices in question would dictate a finding of discrimination--either under an 'intent' standard or an 'effects' standard, in violation of the constitution or the statute. Rather, the sole purpose of the presentation here is in connection with the issues of fact and law presented by this particular case; whether, given all the evidence (1) the parties (and particularly the Board) could have reasonably believed a violation of the constitution could be shown; and (2) the measures adopted by the agreement represent a fair and reasonable effort to resolve any such reasonably perceived violations of law.

"The record supports the following findings of fact and law: (1) there was a reasonable belief on the part of the Board and OCR that the Board's hiring and assignment practices were in violation of Title VI, Title IX, and the constitution; (2) the remedial measures embodied in the agreement represent a reasonable means for attempting to cure what the parties reasonably believed were inequities in the system; and (3) those measures do not violate the plaintiffs' statutory or constitutional rights." (A184).

II.

In its second decision in this case, dated September 22, 1980, the Court of Appeals decided that OCR had jurisdiction over the employment practices of the Board, and that it had jurisdiction to require the Board to agree in the Memorandum of Understanding to hire and to assign teachers on the basis of their race to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding.

The Court of Appeals discussed the

merits of the appeal under the headings of "Teacher Assigmment" and "Hiring Goals".

Under "Teacher Assignment", two of the Judges of the Court of Appeals (MANSFIELD, MESKILL, JJ.), said that there is no reason to think that transfers of teachers pursuant to the Memorandum of Understanding will constitute a "serious professional setback"; and that until such harm is alleged, the requirement in the Bakke case (438 U.S. 265) of prior findings of intentional racial discrimination are not required.

Under "Hiring Goals" the same two Judges said that any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural, and does not amount to a "case or controversy" under Article III of the Constitution. No teacher has alleged that the Memorandum has affected consideration

of his job application. Appellants have not demonstrated a "real and immediate" injury.

REASONS FOR GRANTING THE WRIT

1. OCR HAD NO JURISDICTION TO REQUIRE THE BOARD OF EDUCATION TO AGREE TO HIRE AND TO ASSIGN TEACHERS ON THE BASIS OF THEIR RACE, TO CONFORM TO RACIAL QUOTAS PRESCRIBED IN THE MEMORANDUM OF UNDERSTANDING.

Section 604 of the 1964 Civil Rights Act (42 U.S.C. section 2000d-3) expressly withheld from Federal agencies jurisdiction over employment practices of recipients of federal grants of money:

> "except where a primary objective of the federal financial assistance is to provide employment."

In this case, only one federal grant of money to the Board, amounting to $17,197,533, was for the primary objective of providing employment (A494). This grant was made under the Comprehensive Employment and Training Act ("CETA")

(A494). All other federal grants of money to the Board in 1976, amounting to about $280,000,000, were for the purpose of providing aid to education (A494).

Upon the above-stated undisputed facts, the statute prohibited OCR from exercising jurisdiction over the Board's employment practices, and from requiring the Board to agree in the Memorandum of Understanding that it will hire and assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding.

In analogous cases, Federal courts have decided that OCR has no power under Title IX to regulate employment practices of recipients of federal grants of money. Isleboro School Committee v. Califano, 593 F. 2d 424 (1st Cir. 1979), cert. den. sub. nom. Harris v. Isleboro School Committee, 100 S.Ct. 467 (1979); Romeo Com-

munity Schools v. HEW, 600 F. 2d 581 (6th Cir. 1979), affg. 438 F. Supp. 1021 (D.C. Mich. 1977); Junior College v. Califano, 597 F. 2d 119 (8th Cir. 1979), cert. den. 100 S.Ct. 467 (1979).

The Court of Appeals quoted its prior decision that "the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers", meaning that the Board's employment practices discriminated against and affected unfavorably the education of minority students.

We submit that the statutory prohibition of agency action relating to employment practices of recipients of federal financial assistance given for purposes other than employment, cannot be disregarded, and thus nullified in practice, by giving no effect to such prohi-

bition on the ground that racial discrimination in hiring or assigning teachers has a damaging effect upon the education of black and Hispanic students taught by teachers subjected to racial discrimination in hiring or assignment to particular schools.

Alleged racial discrimination against beneficiaries of federal financial assistance is not a valid reason for giving no effect to the statute prohibiting federal agencies from taking any action about racially discriminatory employment practices of recipients of federal financial assistance where the primary objective of such financial assistance was to provide aid to education, and not to provide employment.

Title VII of the 1964 Civil Rights Act gives to the Equal Employment Opportunity Commission ("EEOC") the power to investigate allegations of racially dis-

criminatory employment practices, and to require elimination or correction of any such employment practices.

Congress intended to give EEOC the function of regulating racially discriminatory employment practices, and assigned to federal agencies which give financial assistance the function of regulating racially discriminatory employment practices only in those cases in which the primary objective of federal financial assistance is to provide employment, because in such a case racially discriminatory employment practices defeat the primary purpose of such financial assistance.

Moreover, the Trial Court made a finding that the plaintiffs submitted evidence that each of the local community school districts had a non-discriminatory number of teachers with five or more years of teaching experience (A21), so

that there was no factual basis for the allegation that racial discrimination in hiring or assigning teachers had a damaging effect upon the education of black and Hispanic students.

The United Federation of Teachers ("UFT"), and the Board, both presented extensive evidence that the quality and quantity of education given to black and Hispanic students is not inferior to that given to white students; and that measured by the pupil/teacher ratio; average class size; percent teachers with five or more years of experience; city tax levy funds expended; and reimbursable funds expended, there were no important differences between predominantly minority and non-minority community school districts and the public schools therein (A780-938).

UFT also presented evidence that the Board expended more money per student, and

gave more teaching time, effort and facilities to teaching black and Hispanic students than to teaching white students, by giving to such black and Hispanic students smaller numbers of students per class, tutors, paraprofessionals, visual aids and other special equipment and facilities (A780-939).

The Court of Appeals cited United States v. Jefferson County Board of Education, 372 F. 2d 836, 882-86 (5th Cir. 1966), affd. en banc, 380 F. 2d 385 (5th Cir., 1967), cert. denied, 389 U.S. 840 (1967). The Court of Appeals said:

> "section 2000d-3 does not bar an action requiring desegregation of school faculty and that faculty integration is essential to student integration."

This is not a case of de jure racial segregation of students or teachers. We submit that the above-quoted statement has limited application only to cases of

de jure racial segregation of public schools.

2. IN THE ABSENCE OF A FINDING THAT THE BOARD INTENTIONALLY DISCRIMINATED RACIALLY AGAINST BLACK AND HISPANIC TEACHERS AND APPLICANTS FOR EMPLOYMENT AS TEACHERS, THE MEMORANDUM OF UNDERSTANDING BETWEEN OCR AND THE BOARD, AND THE BOARD'S ACTIONS IN CARRYING OUT ITS PROVISIONS, UNCONSTITUTIONALLY DENIED TO THE PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS, AND DEPRIVED THEM OF LIBERTY WITHOUT DUE PROCESS OF LAW, BY REVERSE RACIAL DISCRIMINATION.

The decision of the Trial Court stated (A83-84):

> " * * * it is both unnecessary and inappropriate to decide whether or not the Board practices in question would dictate a finding of discrimination -- either under an 'intent' standard or an 'effects' standard, in violation of the constitution or statutes. Rather, the sole purpose of the presentation here is in connection with the issues of fact and law presented by this particular case: whether, given all the evidence, (1) the parties (and particularly the Board) could have reasonably believed a violation of the constitution or the statutes could be shown; and (2) the measures adopted by the agreement represent a fair and reasonable effort to resolve

any such reasonably perceived violations of law."

The judgment of the Trial Court stated (A27-28):

"The court does not decide if, in fact, there was such discrimination. This issue should not be decided on the merits because such a decision, in the context and posture of this case, would discourage voluntary efforts toward compliance with statutory and constitutional requirements. It determined that, under the circumstances, the compliance agreement was a reasonable and sensible way of voluntarily settling the dispute between OCR and the Board. Evidence presented by the Board and the plaintiffs rebutted, in several respects, that presented by the federal defendants and intervenors-defendants. The evidence does support a reasonable belief by the Board that because of the arguable violations of Titles VI and IX and the fourteenth amendment, it was desirable and provident to enter into a remedial agreement eliminating these violations. The Board reasonably believed that a failure to enter into an agreement with OCR would involve substantial possibility of a cut-off of millions of dollars of federal aid, with attendant serious disruption of the City's educational system. However, the Board reasonably believed that were the federal government to seek in-

junctive relief from the federal courts against the challenged practices, the Board could have been found to have discriminated in violation of Titles VI and IX and the fourteenth amendment, with a resulting decree far more drastic than that agreed to."

Two judges in the Court of Appeals (MANSFIELD, MESKILL, JJ.), decided the appeal on a different ground from the Trial Court, as follows:

"Caulfield argues that paragraph 6 [of the Memorandum of Understanding] requires the Board to hire on the basis of a racial quota. He contends that this is improper when there has been no finding of an intention to discriminate. However, any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a 'case or controversy' under article III of the Constitution. No teacher has alleged that the Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is 'real and immediate', rather, it is 'conjectural' and 'hypothetical.' See O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Golden v. Zwickler, 394 U.S. 103, 108-10 (1969)."

At the trial, Dr. Theodore Lang, Associate Superintendent of Schools in charge of Personnel, his successor, Frank Arricale, the Board's Director of Personnel, Marie De Canio, Assistant Director of Personnel, and Gerald Brooks, a Personnel Officer, testified that immediately after the Board signed the Memorandum of Understanding on September 7, 1977, it carried out its provisions for appointment and assignment of teachers on the basis of their race to correct racial imbalance in the employment and assignment of teachers, by rehiring teachers whom it had laid off for reasons of economy, and assigning rehired white teachers to public schools which had a majority of black students, and assigning rehired black teachers to schools which had a majority of white students, by directing rehired white teachers to select a school assign-

ment from a box which contained assignments to public schools which had a majority of black or Hispanic students; and by directing rehired black and Hispanic teachers to select a school assignment from a box which contained assignments to public schools which had a majority of white students (A939-1058).

More than 4,000 white teachers declined to be rehired and assigned to black or Hispanic schools; and 800 rehired white teachers who accepted assignment to black schools later resigned. The Board also offered employment to 10,000 persons on open competitive eligible lists, most of whom declined to accept employment as teachers assigned to black and Hispanic schools (A939-1058).

In making such assignments of rehired teachers, the Board carried out a policy which it said in its "Response" it would

carry out, as follows (A324):

> "2. Teachers and supervisors on preferred lists who are recalled are to be assigned by the Division of Personnel to foster the integration of minority and non-minority personnel and to correct any disparities of experience, salary and educational level in the distribution of personnel. There are now thousands of teachers on preferred lists. As vacancies occur and teachers are recalled, they are assigned by the Division of Personnel. In making these assignments, integration of staff and equalization of experience, salary and education will be determining factors."

Since 1977, the Board has continued to assign rehired teachers, and newly hired teachers, on the basis of their race, to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding.

We submit that since the Trial Court expressly declined to find that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, OCR

and the Board could not constitutionally agree in the Memorandum of Understanding on race conscious remedies to correct racial imbalance by hiring new teachers on the basis of their race, and by assigning to particular schools all teachers on the basis of their race, in order to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding. Regents of University of California v. Bakke, 438 U.S. 265, 287 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 245-246 (1976); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

Under the heading "Teacher Assignment", the decision of the Court of Appeals stated, in part:

> "Although teachers do have a cognizable interest in avoiding transfer

> within the system from one school to another, Rodriguez v. Board of Education, 620 F. 2d 362 (2d Cir. 1980), the teachers' interest is a limited one. Under Rodriguez, the teachers have an interest, under title VII, in being free from transfers that 'constitute a serious professional setback' and that are made for improper reasons such as sex discrimination."

In the absence of a finding of intentional racial discrimination, Congress expressly prohibited federal agencies from requiring transfers of teachers to overcome racial imbalance, by providing in 20 U.S.C. section 1751:

> "No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

In the absence of a finding of intentional racial discrimination, the provisions in the Memorandum of Understanding for hiring and assigning teachers on the basis of their race to achieve and to maintain the racial quotas prescribed in

such Memorandum constitute unconstitutional racial preference.

In Regents of University of California v. Bakke, 438 U.S. 265, 307 (1979), the Court said:

> "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

The collective bargaining agreement between Kaiser Steel Company and the Steelworkers Union, approved in United Steelworkers v. Weber, 443 U.S. 193 (1979) is not a precedent in this case, because that case involved title VII of the 1964 Civil Rights Act, which does not require a finding of intentional racial discrimination, whereas this case involves title VI of the 1964 Civil Rights Act, which does require a finding of intentional racial discrimination.

Moreover, in the Weber case, the

Court said:

> "Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Constitution."

In this case, unlike the Weber case, the racial preferences provided in the Memorandum of Understanding, and the Board's actions in granting such preferences, constitute State action by the Board, a State agency, and Federal action by OCR, a Federal agency.

The constitutionality of the statutory 10% set aside for minority contractors involved in Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), was sustained on the ground that in enacting the statute the Congress made a legislative finding that minority contractors had been subjected to racial discrimination in the awarding of governmental contracts, so that the statute was based on a finding

of racial discrimination.

Although OCR called the allegations in its letter of November 9, 1976 "findings" based on its investigation, the Board disputed such "findings" in its "Response"; and after trial of factual issues presented by OCR's allegations, the Trial Court declined to find that the Board intentionally discriminated racially in its hiring and assignment of teachers.

In these circumstances, the Weber and Fullilove cases do not support the constitutionality of the racial preferences in the hiring and assignment of teachers provided in the Memorandum of Understanding; and they do not support the constitutional power of OCR and the Board to agree to such racial preferences in the Memorandum of Understanding.

Although teachers do not have a constitutional right to be assigned to work

in a particular school, or to be free from transfer and reassignment to other schools from time to time, they do have a constitutional right to be free from transfer and reassignment solely on the basis of their race, just as they have a constitutional right to be free from transfer and reassignment solely on the basis of their sex.

Race and sex do not provide any relevant factual basis for transfer and assignment of teachers.

Those plaintiffs who are teachers are personally affected by the provisions of the Memorandum of Understanding for assignment of teachers to particular public schools on the basis of their race, because they are subject to such assignment at any time. Therefore, such plaintiffs face a "real and immediate" injury from reassignment on the basis of their race

under the Memorandum of Understanding.

In O'Shea v. Littleton, 414 U.S. 488, 496 (1973), the Court said that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury".

The provisions of the Memorandum of Understanding that teachers shall be hired and assigned on the basis of their race to achieve and to maintain employment of black and Hispanic persons as teachers "within a range representative of the racial and ethnic composition of the relevant qualified labor pool" have been in effect continuously since September 7, 1977. Plaintiffs, as members of local community school boards, superintendents of community school districts, principals of public schools, and teachers in public schools, have been subject to the provisions of the Memorandum of Understanding

for hiring and assignment of teachers on the basis of their race continuously since September 7, 1977.

OCR pressed the Board to agree to the Memorandum of Understanding by threatening to cut off federal funds if the Board did not agree to correct alleged racial discrimination in its employment of black and Hispanic teachers, and alleged sexual discrimination in its employment of women.

In these circumstances, the plaintiffs "will in fact be perceptibly harmed by the challenged agency action". United States v. Scrap, 412 U.S. 669, 688 (1972).

Joyce Lewis Shapiro, an intervenor-plaintiff, made an affidavit that she was subjected to racial discrimination by the Board in its performance of its contractual obligations under the Memorandum of Understanding, as follows (A366):

> "4. At the commencement of the 1977-78 school year, I was called to the

> Board of Education hiring hall where I selected a teaching assignment to Community School District 22, Brooklyn, by drawing such assignment from a box.
>
> 5. I reported to Community School District 22 for assignment to a specific elementary school within that District but was told to return to the Central Board of Education for reassignment. I was told that District 22 was rejecting my assignment because I was white and that District needed black teachers."

Those plaintiffs who are members of community school boards or superintendents of community school districts have a direct personal stake in the constitutionality of the provisions of the Memorandum of Understanding for hiring and assignment of teachers on the basis of their race, because they may be subject to personal liability for damages for such unconstitutional racially discriminatory actions.

In Board of Education v. Allen, 392 U.S. 236, 241 (1968), it was decided that members of a school board had standing to

sue for judgment declaring unconstitutional a statute directing school districts to lend textbooks free of charge to students in parochial schools. See, also: Baker v. Carr, 369 U.S. 186, 204 (1962).

Those plaintiffs who are members of community school boards, or superintendents of community school districts, may be subject to personal liability for damages for their personal participation in actions, in obedience to directives of the Board, carrying out the provisions of the Memorandum of Understanding that teachers shall be hired and assigned to public schools on the basis of their race to achieve racial quotas or "goals" prescribed in such Memorandum, if they knew, or should have known, that their actions would violate the constitutional rights of persons affected thereby. Wood v. Strickland, 420 U.S. 308, 322 (1975);

Scheuer v. Rhodes, 416 U.S. 232 (1973); Bertot v. School Dist. #1, Albany County, Wyoming, 522 F. 2d 1171 (10th Cir. 1975); Simineo v. School Dist. #16, Park County, Wyo., 594 F. 2d 1353 (10th Cir. 1979).

3. THE BOARD'S ANNUAL RACIAL CENSUS OF TEACHERS UNCONSTITUTIONALLY INVADED THEIR PRIVACY, AND DEPRIVED THEM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

The second decision of the Court of Appeals in this case, dated September 22, 1980, did not discuss the constitutionality of the racial census of teachers, which was challenged in the complaint, and by motion for preliminary injunction, denial whereof was affirmed in the 1978 decision of the Court of Appeals.

In its first decision in this case, 583 F. 2d 605, the Court of Appeals affirmed the denial of plaintiffs' motion for a preliminary injunction against a racial census.

The Board required those plaintiffs who are members of community school boards, and superintendents of community school districts, to make an annual racial census of teachers and to report to the Board the race of each teacher employed in the community school district.

In Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), the dissenting opinion of Justice Stewart speaks of "the odious practice of delineating the qualities that make one person a Negro and make another white".

Questions about the race of teachers unconstitutionally invade the privacy of teachers who are required to answer them, and they unconstitutionally deny to them the equal protection of the laws.

They also deprive members of community school boards and superintendents of community school districts of liberty and

property without due process of law, by requiring them to compel teachers whom they supervise to answer such unconstitutional questions.

In Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1962), it was decided that a legislative committee's subpoena of records of membership in N.A.A.C.P. unconstitutionally invaded the privacy of persons named in membership lists, and, also, caused harm to them and to N.A.A.C.P.; and that the legislative committee had shown no compelling governmental reason for disclosure to it of the membership lists of N.A.A.C.P.

A racial census of teachers violates their most intimate personal privacy -- their right to be let alone -- without being compelled to disclose their race. Compare: Griswold v. Connecticut, 381 U.S. 479, 485-486 (1964); Roe v. Wade,

410 U.S. 113, 152-153 (1972); Whalen v. Roe, 429 U.S. 589, 599 (1976); Stanley v. Georgia, 394 U.S. 557 (1968); California Bankers Assn. v. Shultz, 416 U.S. 21 (1973).

The Freedom of Information Act (5 U.S.C. section 522) excepts from disclosure:

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

See: Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150, 168 (D.C.D.C. 1976).

Asking a teacher to disclose her race, with her answer entered in a governmental record, unconstitutionally invades her privacy.

No substantial governmental interest justifies the asking of the question, or the compelling of the answer.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

December 15, 1980

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioners

HAROLD F. HAY
of counsel

Footnote re Parties:

In addition to the parties named in the caption of this Petition the United Federation of Teachers (Albert Shanker, et al.) was an Intervenor-Plaintiff who participated in the appeal to the Court of Appeals; and the Council of Supervisors and Administrators, a labor union of School Supervisors, was an Intervenor-Plaintiff which withdrew its appeal to the Court of Appeals from the judgment dismissing its complaint.

APPENDIX

OPINION AND JUDGMENT DATED SEPTEMBER 22, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 733, 734, 1000—September Term, 1979

(Argued May 21, 1980 Decided September 22, 1980)

Docket Nos. 79-6191, -6193, -6201

WILLIAM CAULFIELD, *et al.*,

Plaintiffs-Appellants,

and

ALBERT SHANKER, *et al.*,

Intervenors-Plaintiffs-Appellants,

and

THEODORE ELSBERG, *et al.*,

Intervenors-Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER,

Defendants-Appellees,

and

JOSEPH CALIFANO, JR., *et al.*,

Defendants-Appellees,

ARTHUR N. EISENBERG, New York Civil Liberties Union, New York, New York (E. Richard Larson, American Civil Liberties Union, New York, New York, Jeanne Silver Frankl, Public Education Association, New York, New York, on brief), *for Intervenors-Defendants-Appellees Coalition of Concerned Black Educators.*

OAKES, *Circuit Judge:*

This appeal, yet another chapter in the litigation concerning hiring, assignment and promotion practices in the New York City school system,[1] is from a final judgment entered on July 17, 1979, in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* dismissing a complaint raising constitutional and statutory objections to a "Memorandum of Understanding" (Memorandum) between the Board of Education of the City of New York (Board) and the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW). The challenged Memorandum, executed on September 7, 1977, obligated the Board to change its teacher employment and assignment policies in order to remedy the discrimination found by an OCR investigation

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1 *See Board of Educ. v. Harris*, 444 U.S. 130 (1979), *aff'g* 584 F.2d 576 (2d Cir. 1978); *Board of Educ. v. Harris*, 622 F.2d 599 (2d Cir. 1979), *aff'g* No. 78 C 2135 (E.D.N.Y. Dec. 22, 1978); *Caulfield v. Board of Educ.*, 583 F.2d 605 (2d Cir. 1978), *aff'g in part and rev'g in part* 449 F. Supp. 1203 (E.D.N.Y. 1978); *Board of Educ. v. Harris*, No. 79 C 3233 (E.D.N.Y. Feb. 21, 1980), *appeal docketed*, No. 80-6050 (2d Cir. Apr. 29, 1980).

conducted pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686. Shortly after the Memorandum was signed, plaintiffs-appellants, including a local school board and teachers allegedly affected by the agreement, filed suit against the Board, the State Commissioner of Education, and CCR, seeking declaratory and injunctive relief against certain provisions of the Memorandum as violative of the fifth and fourteenth amendments and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e-2. The district court permitted the United Federation of Teachers, the Council of Supervisors and Administrators, and others to intervene as plaintiffs and permitted the Coalition of Concerned Black Educators, Ronald Ross, the Public Education Association, and the American Civil Liberties Union to intervene as defendants.

In a previous chapter in the history of this litigation, this court affirmed a denial of injunctive relief against the enforcement of a provision of the Memorandum requiring the collection of racial and ethnic data by the Board. At the same time this court reversed the district court's order remanding the case to HEW for further proceedings in which plaintiffs-appellants would be permitted to participate. *Caulfield v. Board of Education (Caulfield I)*, 583 F.2d 605 (2d Cir. 1978). We found in that case that the Memorandum was "voluntary" and that HEW, in seeking voluntary compliance with Title VI before resorting to fund termination, was not required to allow the plaintiffs-appellants to participate in formulating the Memorandum. *Id.* at 612-15; *see* 42 U.S.C. § 2000d-1. We then remanded for a hearing on the merits of the plaintiffs'

constitutional and statutory challenges to the Memorandum. The present appeal is from the district court's dismissal of plaintiffs' complaints and the court's determination that the Memorandum is valid.

FACTS

As a recipient of federal funds, the Board must comply with the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[2] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681,[3] and their implementing regulations;[4] it may not discriminate on the basis of race, color, national origin or sex in education programs that receive federal funds. OCR has the responsibility of ensuring compliance through reviews, investigations and complaint resolution. As we recounted in *Caulfield I*, *see* 583 F.2d & n.3, the director of OCR advised the Board by letter dated November 9, 1976, that the Board was not in compliance with Title VI because it had (1) "denied minority teachers full access to employment opportunity" by using racially discriminatory selection and testing procedures and by using

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2 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3 20 U.S.C. § 1681 provides in part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

4 The Title VI regulations are in 45 C.F.R. §§ 80.1-.13 (1979); the Title IX regulations are in 45 C.F.R. §§ 86.1-.71 (1979).

racially identifiable employment pools in a way that restricted placement, (2) assigned teachers and principals in a manner that created, confirmed and reinforced racial identifiability of the system's schools, and (3) "assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools with higher percentages of minority students." OCR also found the Board in violation of Title IX because it had denied females equal access to supervisory positions, provided less financial support for female athletic programs, and deprived female teachers of seniority rights and other compensation by failing to eliminate the effects of past discriminatory leave policies.

Ten months of negotiation ensued. During this time the Board's Deputy Chancellor Bernard Gifford chaired an internal committee reviewing and evaluating OCR's allegations. What is known as "the Gifford Report" substantiated and confirmed many of OCR's findings, although it denied any discriminatory intent on the part of the Board. *See Caulfield I,* 583 F.2d at 609 n.5. The Board itself on April 22, 1977, suggested affirmative efforts to equalize employment opportunities. *See id.* at 608. OCR rejected this proposed compliance plan but further negotiations resulted in the promulgation of the September Memorandum of Understanding challenged in this lawsuit. The Memorandum establishes a three-year plan to comply with Title VI and Title IX through affirmative action. We have set out in the margin key provisions of the agreement as they are reported in Judge Weinstein's memorandum opinion.[5]

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[5] 1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a

THE PROCEEDINGS BELOW

In appellants' complaint they alleged that HEW lacked Title VI jurisdiction to investigate the Board's

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whole for each educational level and category, subject only to education-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

4. The Board . . . will adopt and implement the following affirmative action procedures, and will sponsor and actively support state legislation at the next session of the Legislature where necessary to accomplish these ends.

(a) Any test used henceforth to determine whether a person is qualified for a teaching position in the system shall be validated prior to its being administered; except that in cases of demonstrable educational necessity . . . a test may be used prior to its validation for temporary assignments, provided that validation shall be accomplished as soon as practicable. . . .

(b) All existing eligibility lists by license shall be combined, and the names of all persons contained thereon shall be merged with the names of any persons who have passed any new tests, without regard to the dates of examinations.

(c) Rank ordering of persons who have passed examinations for the system shall be abolished.

(d) In employing and assigning teachers pursuant to these modified standards and procedures, the Board . . . will implement affirmative action mechanisms found to be appropriate, such as, for example, giving hiring preferences to all eligible persons with prior experience in the system.

* * * * *

(footnote continued on next page)

employment practices because under 42 U.S.C. § 2000d-3[6] HEW can take such action only with respect to programs in which providing employment is a "primary objective of the Federal financial assistance." They further alleged that the agreement's remedial measures are impermissible absent a formal administrative or judicial finding of intentional discrimination and that the evidence does not support a finding of intentional discrimination. *Cf. Lora v. Board of Education*, No. 79-7521, slip op. 3253 (2d Cir. June 2,

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5. The Board . . . agrees that, in the event that the above-described legislation is not adopted so as to govern employment decisions for the 1978-79 school year, the Board will seek appropriate litigation in support of the agreed objectives.

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 . . . and other efforts . . . the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

6 42 U.S.C. § 2000d-3 provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

1980) (intentional discrimination required to make out a violation of Title VI). Appellants also contended that the Memorandum, by requiring teacher assignments on the basis of race, established a "quota system" in violation of a number of statutes, including Titles VI and VII of the Civil Rights Act of 1964, and the fifth and fourteenth amendments.

The district court held that HEW had jurisdiction to investigate and seek compliance under the authority of 45 C.F.R. § 80.3(c)(3) (1979),[7] a Title VI regulation

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7 45 C.F.R. § 80.3(c) provides in part:

Employment practices. (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the compe[ti]tive labor market. . . .

* * * * *

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

authorizing oversight of the employment practices of a recipient of federal funds when such practices have a discriminatory impact upon direct beneficiaries of the federal funds, in this case, the students themselves. Here, HEW had alleged that the Board's employment practices have such an effect because discrimination in teacher hiring and assignment has deprived students of equal educational opportunity both by reinforcing the racial identifiability of schools and, in some cases, by resulting in the assignment of less qualified or experienced teachers to predominantly minority schools. The district court found that discrimination by race in the hiring and assignment of teachers or supervisors constitutes discrimination against students. In addition, the court rejected the argument that the Memorandum must be invalidated in the absence of a finding of intentional discrimination. Instead, it upheld the agreement, stating that the issue was really whether the parties entering into a Title VI or Title IX remedial plan had a reasonable belief that the practices at issue might result in liability, whether the remedial measures adopted are reasonable in view of the perceived liability, and whether the measures violate statutory or constitutional rights.

DISCUSSION

Jurisdiction

We agree with the court below that Title VI enforcement procedures apply to the Board's teacher hiring and assignment practices and that HEW therefore had jurisdiction to investigate and seek compliance. Appellants rely upon section 604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3, the

section which authorizes administrative action under Title VI with respect to employment practices only when a primary objective of federal funding is to provide employment.[8] Their argument is similar to the one advanced in 1978 by appellants in *Caulfield I*, 583 F.2d at 610-11. There the argument was made to oppose the collecting of statistics regarding the ethnic and racial composition of the teaching staff. We found, however, that OCR's charging letter to the Board of November 9, 1976, "specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on minority schoolchildren." *Id.* at 611. Accordingly, we held that OCR's investigation was within the bounds of 42 U.S.C. § 2000d, which outlaws discrimination in federally funded programs, and not 42 U.S.C. § 2000d-3, because "the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such." 583 F.2d at 611. We see no reason to depart from our holding in that case. Indeed, we are bound by it, but even if we were not, we would agree with the Fifth Circuit decision in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966) (Wisdom, J.), *aff'd en banc*, 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied*, 389 U.S. 840 (1967), that section 2000d-3 does not bar an action requiring desegregation of school faculty and that faculty integration is essential to student integration. *See also Marable v. Alabama Mental Health Board*, 297 F.Supp. 291, 297-98 (M.D. Ala. 1969) (three-judge court) (Johnson, J.).

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[8] *See* note 6 *supra*.

Appellants also argue that HEW lacked jurisdiction under Title IX to investigate the school system's employment practices. Again, we agree with the lower court that the government could reasonably proceed on the theory that a school system's discrimination against women in access to supervisory positions would have a discriminatory effect on students, the direct beneficiaries of the federal aid. *See Islesboro School Committee v. Califano*, 593 F.2d 424, 430 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 467 (1980).

Teacher Assignment

The author of this opinion would be content to affirm the holding concerning the validity of the Memorandum on the same ground relied on by Judge Weinstein below, *viz.*, that the affirmative remedies required under the Memorandum of Understanding were reasonable in light of the parties' reasonable belief that the practices at issue might result in liability under Titles VI and IX and under the Constitution. As early as 1958 a New York state court found that teacher assignment practices were racially discriminatory and that such practices had a discriminatory effect on students. *In re Skipwith*, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958). As the district court in the present case noted, since 1951 virtually every commission, agency and consulting firm reviewing the Board of Examiners' system of competitive examinations for teachers has called for its "substantial reform or abolition. . . . A chief reason for this criticism has been that the system tended to discourage minority teachers from applying and to screen them out." In *Caulfield I* we discussed OCR's and the Board's own findings concerning the denial of full access to employment opportunity to

minority teachers, the creation and reinforcement of racial identifiability of schools by the placement of teachers, and the assignment of minority teachers with less experience, lower salaries and fewer advanced degrees to predominantly minority schools. *See* 583 F.2d at 608-09 & nn. 3 & 5.

In upholding the validity of the Memorandum, the district court compared this voluntary agreement to remedy possible Title VI and Title IX violations to the voluntary agreement to remedy possible Title VII violations upheld in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The argument for upholding a voluntary affirmative action plan is even stronger in this case than it was in the *Weber* case, for here HEW itself initiated the investigation and notified the Board of alleged Title VI and Title IX violations. *Cf. Weber*, 443 U.S. at 204 (Title VII does not prohibit private parties from voluntarily taking steps to comply with Title VII); *Regents of the University of California v. Bakke*, 438 U.S. 265, 301-02 & n.41 (1978) (Powell, J.) (racial preferences may be upheld against constitutional attack when based on findings by administrative body charged with monitoring compliance with antidiscrimination statutes). In fact, both Title VI and Title IX *require* the government to seek voluntary compliance before terminating funds or taking other steps to enforce compliance. *See* 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682. Under the circumstances of this case, we agree with the district court that the voluntary agreement between OCR and the Board, though possibly affecting the interests of teachers and others who did not participate in its formulation, is a reasonable and valid effort by the Board to comply with Titles VI and IX.

My colleagues, however, rest their decision on a different ground and do not reach the question that the court below and I consider. Their view is that the case in its present posture does not contain an allegation that any individual's "liberty or privacy interests" have been invaded by state action. They recognize that Mr. Justice Powell's determinative opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), requires that every person has a right to treatment as an individual, free from the adverse consequences of race- or sex-conscious remedies unless there has been a prior administrative, legislative or judicial determination of intentional discrimination against the particular group to be benefitted by the affirmative action plan. Of course, no such finding has been made in the present case.

The absence of such a finding, however, does not invalidate the Memorandum. Although teachers do have cognizable interest in avoiding transfer within the system from one school to another, *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), the teachers' interest is a limited one. Under *Rodriguez*, the teachers have an interest, under Title VII, in being free from transfers that "constitute a serious professional set-back" and that are made for improper reasons such as sex discrimination. *See Id.* at 365-66. To be sure, the *Rodriguez* court identified the right involved as a statutory one, *Bakke* requires a finding of discrimination before any state action invading a "liberty or privacy interest" of an individual, from whatever source derived.

There is no reason to think, my colleagues' position continues, that transfers traceable to the OCR-Board Memorandum of Understanding will in any particular

case constitute a "serious professional setback." Until an individual teacher alleges such harm, there is nothing, in their view, to trigger *Bakke's* requirement of prior findings of discrimination. The simple expectation of being assigned to a particular school within the system is not, then, a right protected under Title VI, Title IX or the Constitution.

Hiring Goals

Appellant Caulfield alone challenges paragraph 6 of the Memorandum. That paragraph has two components, the first requiring the Board to perform "a study of the relevant qualified labor pool by race, ethnicity and sex," and the second requiring the Board, through the adoption and implementation of affirmative action procedures, the support and sponsorship of legislation described in paragraph 4 of the Memorandum and other efforts, to achieve levels of minority participation in the teaching and supervisory service "within a range representative of the racial and ethnic composition of the relevant qualified labor pool."

We agree with the district court that HEW did have authority to require a census of the labor pool for the same reason, discussed above, that it had authority to investigate and seek compliance. Caulfield argues that paragraph 6 requires the Board to hire on the basis of a racial quota. He contends that this is improper when there has been no finding of an intention to discriminate. However, any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a "case or controversy" under article III of the Constitution. No teacher has alleged that the

Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is "real and immediate;" rather, it is "conjectural" and "hypothetical." *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). Indeed, until the Board completes a labor pool study that is acceptable to CCR, the extent of the Board's obligations will not begin to be determined. Appellants themselves have argued that the Board's teaching corps is already within a range representative of the qualified labor pool. If this is true, the Board will not be required to take any action under paragraph 6, much less the kind of race-conscious hiring that Caulfield challenges. Because the court may not entertain purely hypothetical cases, Caulfield's challenge must be dismissed.

Judgment affirmed.

OPINION AND JUDGMENT DATED SEPT. 5, 1978

William CAULFIELD et al., Appellants,

v.

The BOARD OF EDUCATION OF the CITY OF NEW YORK et al., Appellees.

Nos. 1144 to 1149, Dockets 78–6035, 78–6044, 78–6058, 78–6066, 78–6080 78–6081 and 6141.

United States Court of Appeals, Second Circuit.

Argued June 19, 1978.

Decided Sept. 5, 1978.

Morris Weisberg, New York City (Harold F. Hay, New York City, of counsel), for appellant-cross-appellee.

Leonard Greenwald, New York City (Gretchen White Oberman, Lewis, Greenwald & Oberman, New York City, of counsel), for intervenor-appellant-cross-appellee.

Jessica D. Silver, Washington, D. C. (Drew S. Days, III, Asst. Atty. Gen. of the United States, Brian K. Landsberg, Cynthia L. Attwood, Dept. of Justice, Washington, D. C., David G. Trager, U. S. Atty. for the Eastern District of New York, Richard P. Caro, Asst. U. S. Atty., Brooklyn, N. Y., of counsel), for appellee-cross-appellant.

Arthur Eisenberg, New York City (E. Richard Larson, Carol L. Ziegler, New York Civil Liberties Union, Robert H. Hermann, M. L. Taracido, Puerto Rican Legal Defense and Education Fund, Inc., New York City, of counsel), for appellee-cross-appellant.

Doron Gopstein, Asst. Corp. Counsel (Allen G. Schwartz, Corp. Counsel of the City of New York, New York City, of counsel), for appellee New York City.

Nathaniel R. Jones, James I. Meyerson, New York City, Coalition of Concerned Black Educators, for intervenor-appellees-cross-appellants.

Before OAKES and VAN GRAAFEILAND, Circuit Judges, and PIERCE, District Judge.*

OAKES, Circuit Judge:

On this consolidated appeal, the parties challenge two separate orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge. The first is an order of February 24, 1978, denying the motion of plaintiffs-appellants (appellants) who are New York City teachers, principals, community school board officials and parent-teacher association officials, for a preliminary injunction to prevent city, state and federal officials, defendants-appellees (appellees), from collecting data on the ethnic identification of teachers and supervisors. Appellants appeal the denial of the preliminary injunction against data collection. In the second order, dated March 15, 1978, Judge Weinstein sua sponte remanded the case to the Department of Health, Education & Welfare (HEW) for further administrative proceedings to afford appellants and other interested persons the opportunity to participate in the administrative proceeding. The federal appellees have cross-appealed from the order remanding the proceedings to HEW.

With respect to the order denying the injunction against data collection, we hold that the district court did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors. We further hold that in its second order the district court erroneously remanded the case to HEW for further proceedings. Accordingly, we affirm the district court's order of February 24, 1978, but reverse its order of March 15, 1978.[1]

I. *Background*

At this stage of the proceedings, no facts have been found, no stipulation of undisputed facts agreed upon, no evidentiary record developed. For purposes of the appeal, however, we will rely, as the district court did, on documents appended to various pleadings. These documents reveal that the principal subject of this lawsuit is a September 7, 1977, Memorandum of Understanding (Memorandum) between the Office for Civil Rights (OCR) at HEW on the one hand and the Board of Education of the City of New York (City Board) on the other. The Memorandum obligated the City Board to alter certain teacher and supervisor employment and assignment practices and to remedy the discriminatory effect of those practices on a phased basis by 1980. For its part, OCR agreed that the City Board's promised actions would constitute compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–86.[2]

The process leading up to negotiation of the Memorandum was set in motion on

(Footnotes follow at end of judgment.)

March 18, 1976, when the acting director of OCR wrote to the Chancellor of the City Board to notify him that OCR had received several complaints of discrimination by the City Board against minority teachers. The letter further informed the Chancellor that OCR would conduct a review of employment practices in the New York City school system to evaluate compliance with laws barring discrimination in federally financed programs. Following investigation, OCR informed Chancellor Anker by letter of November 9, 1976, that the City Board was in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681.[3] That letter discussed the City Board's employment practices, including its discriminatory methods of selection and assignment of teachers, called for submission of a remedial plan, and concluded by offering assistance in preparing the plan. Affidavits on file indicate that, at or about the same time, the OCR director attended a well publicized public briefing at which he explained OCR's findings and invited comments from those in attendance and from the community at large.

OCR's letter of November 9 prompted the establishment of an internal City Board committee to examine OCR's allegations. As part of its study, this committee consulted a number of organizations, including some of those participating in this lawsuit as intervenors or amici curiae.[4] On April 22, 1977, before the internal committee had completed its study, the City Board forwarded to OCR its response to the November 9 letter. Without admitting any violation of law, the City Board expressed its determination to rectify "disparate employment opportunities" and proposed an equal

employment opportunity plan to "insure equality of opportunity and avoidance of discrimination.". The City Board's plan suggested affirmative efforts to increase the number of minority teachers, to improve integration of the teaching staff, and to correct disparities of experience, salary and educational level in the distribution of personnel. The plan also advocated goals for integration of faculty based upon a numerical index, legislative replacement of rank order lists with qualifying lists for teacher selection, and a new system of teacher certification and selection. However, OCR found the plan insufficient and notified the City Board on July 6, 1977, that it was principally concerned with the lack of specificity in the City Board's response. Just prior to OCR's rejection of the City Board's plan, the report of the internal City Board committee (the "Gifford Report") was published. The Gifford Report furnished documentary confirmation of the discriminatory and segregative nature of the City Board's employment practices.[5] This report may well have exerted some considerable influence in the City Board's ultimate decision to conclude the Memorandum with OCR.

In negotiating the Memorandum, the City Board requested that the United Federation of Teachers (UFT), though not the other parties, be consulted on the terms of the agreement. The UFT was consulted and it agreed to support the adoption of legislation necessary to effectuate the Memorandum. In a press release the City Board hailed the agreement for having been reached "without resort to the courts or other confrontations that might have polarized our city." The release further described the Memorandum as an agreement which carries forward the existing affirmative action program and accepts a "commit-

ment based on applicable standards of law." After the Memorandum was signed but prior to ratification, the City Board held a public meeting on October 19, 1977, with two weeks' advance notice. Thereafter, the City Board ratified the Memorandum by resolution.

On October 31, 1977, the appellants [6] filed this action seeking a declaration that certain provisions of the Memorandum were unconstitutional, illegal and invalid. They also sought an injunction against the enforcement of those provisions and against requiring the appellants to provide data on the ethnic background of teachers and supervisors. Appellants sought summary judgment or a preliminary injunction. After a hearing, the district court by order of February 24, 1978, ruled only on that part of the motion for a preliminary injunction which sought to enjoin the collection of ethnic data and denied relief.[7] A notice of appeal was filed. This court denied an injunction pending appeal but expedited the appeal.

By the same order, the district court sua sponte directed that the pleadings of all plaintiffs be amended to include a claim that their constitutional and statutory rights were abridged by OCR's failure "to afford them and other interested persons the opportunity . . . to participate in the administrative proceedings." The district court then ordered all parties to appear on March 7, 1978, to show cause why the action should not be remanded for OCR's failure to afford such participation. At the March 7, 1978, hearing no party requested a remand but rather each sought to have the proceedings continue in the district court so that the district judge might decide the legality of the Memorandum. However, on March 15, the court

ordered the agreement vacated and remanded the case to OCR. It also ordered the City Board relieved of its obligations under the Memorandum, denied all pending motions as moot with leave to renew, and stayed all proceedings pending completion of the administrative hearings on remand. This appeal followed.[8]

II. *Discussion*

A. Denial of the Preliminary Injunction Against Collection of Ethnic Data

Plaintiffs sought to enjoin the mandatory answering of ethnic questionnaries. These questionnaries were distributed to the school system's community school districts. All supervisors and teachers employed in the city's public schools were required to answer questions pertaining to their race, color, sex and national origin. In denying appellants' motion in the February 24 order, the district court made no findings of fact or conclusions of law, although it did note that there is a clear right and obligation of authorities to gather data in order to determine, *inter alia*, whether there has been unlawful discrimination.

[1] This court has recently clarified the standard for issuance of a preliminary injunction: there must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Selchow & Righter Co. v. McGraw-Hill Book Co.*, No. 77–7569, slip op. at 3533, 3537, 580 F.2d 25 at 27 (2d Cir. 1978); *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *see* Mulligan, *Foreword—Preliminary Injunction in the*

Second Circuit, 43 Brooklyn L.Rev. 831, 832–33 (1977). Since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law. Absent any evidence, the district court could not conclude that the appellants were likely to suffer irreparable injury, much less that the balance of hardships weighed decidedly in their favor. *See Gillespie & Co. of New York v. Weyerhaeuser Co.*, 533 F.2d 51, 53 (2d Cir. 1976) (per curiam).

Moreover, appellants have failed to show that they are likely to succeed on the merits. *See id.* They argue, first, that because the agreement between OCR and the Board was vacated by the district court, any racial/ethnic survey to be conducted in conjunction with the Memorandum is invalid. However, they have made no showing that the survey of the ethnic composition of the existing staff of the school system would only be conducted because the Memorandum provided for it. Indeed, for all that appears in the record, this survey is one routinely conducted by the City Board as part of its annual school census.

[2] Appellants also argue that because Title VI does not prohibit racial/ethnic discrimination in employment where providing employment is not a primary objective of federal aid, 42 U.S.C. § 2000d–3,[9] OCR cannot lawfully seek statistics regarding the ethnic and racial composition of the teaching staff. However, appellants have mischaracterized the nature of the OCR investigation. The charging letter of November 9, 1976, specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on minority

schoolchildren: "[B]y assigning teachers to schools in such a manner . . . [,] minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees." Accordingly, OCR's investigation falls within the parameters of 42 U.S.C. § 2000d,[10] and not 42 U.S.C. § 2000d–3, *see* note 9 *supra*, since the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such.[11] In the context of this OCR investigation, then, the collection of racial and ethnic data is authorized by Title VI.[12] *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 882–84 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967).

[3] Appellant's additional arguments that the proposed census would violate other federal statutes and the Constitution are unpersuasive. The Privacy Act of 1974, 5 U.S.C. § 552a, is invoked but it does not prohibit the collection or retention of such data in this context. Title VI and its regulations authorize the collection of staff data which in turn is permitted to be maintained under 5 U.S.C. § 552a(e)(1).[13] Nor does the Equal Education Opportunities Act, 20 U.S.C. § 1751, prohibit the collection of racial and ethnic staff data.[14] At this stage of the record, where it does not appear whether or not teacher and supervisor assignments in the New York public schools violate Title VI, plaintiffs' assertion that these practices are not violative cannot be taken as fact. Thus any suggestion that OCR's actions are directed at overcoming simple racial imbalance is premature.

[4] Finally, the Constitution itself does not condemn the collection of this data. *Cf. United States v. State of New Hampshire*,

539 F.2d 277, 280–82 (1st Cir.) (upholding as constitutional a requirement pursuant to § 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–8(c), that the State provide racial and ethnic employee data to the federal government on an EEO–4 form), *cert. denied*, 429 U.S. 1023 (1976). The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals within *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), or *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670, 673–78, 697–701, 770–72 (1973); *cf. Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (statute requiring submission of form with patient's name to State Department of Health in case of certain prescription drugs not unconstitutional); *Schachter v. Whalen*, 581 F.2d 35 (2d Cir. 1978) (statute granting power to subpoena medical records from doctor under investigation by State not unconstitutional).

B. District Court Remand to HEW

[5] The federal appellees, as cross-appellants, argue strenuously that the district court erred in sua sponte remanding the case to HEW.[15] We agree.

[6] Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–1,[16] provides for three types of action to secure compliance with the substantive provisions of Section 601, 42 U.S.C. § 2000d:[17] (1) refusal to grant or termination of assistance, (2) other means authorized by law such as a reference to the Department of Justice, 45 C.F.R. § 80.8(a);[18] and (3) volun-

tary means. Where the agency seeks to compel compliance through termination of funds or other means, Section 602 requires that the agency proceed by formal means including an administrative hearing at which a record is made. Before doing so, however, HEW must attempt to secure compliance by voluntary means. 42 U.S.C. § 2000d–1; *see* note 16 *supra*.[19]

While HEW's regulations specify a variety of procedures to effectuate fund termination,[20] they do not provide for public participation or a hearing when HEW acts informally.[21] In addition, pursuant to Executive Order 11764 of January 21, 1974, granting the Attorney General authority to prescribe standards and procedures for Title VI enforcement, the Attorney General has adopted regulations which provide simply that any agreement to "take remedial steps . . . shall be set forth in writing by the recipient and the federal agency[,] . . . specify the action necessary for the correction of Title VI deficiencies and . . . be available to the public." 28 C.F.R. § 42.411(b). No other procedures, such as a hearing or public participation, are required. These regulations are entitled to some weight in construing the meaning of Title VI. *See Lau v. Nichols*, 414 U.S. 563, 566–69, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

Because HEW did not seek compliance by fund termination, but rather by a voluntary agreement, HEW was not required to afford cross-appellees an opportunity to participate. The action taken here to effect compliance was precisely the type of action contemplated by Congress in using the phrase "voluntary means." 42 U.S.C. § 2000d–1; *see* note 16 *supra*.

Nevertheless, the district court held that participation was mandatory on the basis that the agreement was not voluntary. The principal reason for the district court's finding of involuntariness was that the City Board, along with the City as a whole, was in the midst of a fiscal crisis and presumably could not afford a fund termination while it litigated the issue of Title VI compliance. But the only fund termination sought by HEW related not to Title VI funds but to Emergency School Aid Act funds.[22] To be sure, a threat of potential fund termination lurked in the background since without such leverage voluntary compliance might possibly never be achieved. And after all, if there is lack of compliance, HEW is obligated to enforce the statute ultimately by terminating funds. *Adams v. Richardson*, 156 U.S.App.D.C. 267, 271, 480 F.2d 1159, 1163 (1973).[23] Undoubtedly then there is a certain amount of coercion inherent in the enforcement scheme. *See United States v. Jefferson County Board of Education, supra*, 372 F.2d at 856 (quoting Report of the United States Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965–1966*, 2).

Undercutting any actual coercion, however, are several points. The City Board's own study, the Gifford Report, confirmed the conditions cited in the November 9 letter from OCR. Moreover, the City Board's press release indicated that the agreement had been reached in a spirit of cooperation. And of course, the lack of participation by the Council of Supervisors and Administrators (CSA) cannot render a voluntary agreement involuntary. The City Board's commitments under the Memorandum, despite its impact on teachers and supervisors,

came about by the City Board's decision to comply with OCR's interpretation of Title VI, not by any fund-termination action by OCR. *Cf. Maher v. Roe*, 432 U.S. 464, 475–76 & n. 9, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977) (distinction between direct "interference with a protected activity and . . . encouragement of an alternative [permissible] activity"). In addition, there was ample opportunity to communicate with the City Board between the time the terms of the agreement became publicly known and the time of its ratification, but no party, including CSA, sought to participate during that hiatus, although most parties were consulted in the interim.

In any event, the statutory scheme requires a hearing with notice only when HEW seeks fund termination. *See, Board of Public Instruction of Palm Beach County v. Cohen*, 413 F.2d 1201, 1202–03 (5th Cir. 1969). Where, as here, Congress has determined what procedures shall be required in effecting compliance with Title VI, the courts may not override that determination simply because they believe other procedures would be preferable. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

Order denying preliminary injunction on collection of racial/ethnic data affirmed; order remanding to HEW for administrative proceedings reversed; cause remanded to the district court for hearing on the merits.

Footnotes

1. In view of the posture of the case below and the questions certified in the order for appeal under 28 U.S.C. § 1292(b), *see* note 8 *infra*, we do not reach three questions which were not decided on the merits below but are here raised by the appellants. Appellants argue that (1) HEW and the Office for Civil Rights (OCR) do not have power to take action upon allegations that the employment practices of the appellee, Board of Education of the City of New York (City Board) discriminated illegally and unconstitutionally against minorities, (2) the City Board's employment practices complained about in a letter of OCR to the City Board dated November 9, 1976, *see* note 3 *infra*, do not constitute illegal and unconstitutional racial discrimination against minorities and (3) the Memorandum of Understanding between the City Board and OCR, *see* note 2 *infra*, and the City Board's actions carrying out its provisions unconstitutionally denied appellants equal protection of the laws by resulting in "reverse discrimination" and deprived them of liberty and property without due process of law.

2. The Memorandum committed the City Board to undertake a number of actions, some of which include:

> 1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> 2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> 3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it

has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

* * * * * *

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

The Board has advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study.

* * * * * *

3. The letter stated in pertinent part:

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the Civil Rights Act of 1964 (42 U.S.C. [§] 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. [§] 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

4. These organizations included the American Jewish Congress, the United Federation of Teachers (UFT), the Council of Supervisors and Administrators (CSA), the NAACP and the New York Civil Liberties Union.

5. In part, the Gifford Report summarized its conclusions as follows:

(1) *There is an inexplicable, non-rational disparity between the percentage of minority teachers in the New York City school system and the percentage of minority teachers in 46 other non-southern, urban school systems.*

In order to dismiss or affirm the possibility that the recruitment, selection, and placement practices of the New York public schools contributed to this disparity, we developed a sophisticated econometric model of the social and economic relationships affecting the size of the minority teacher population in New York City and 46 other non-southern, urban cities. The results of the analysis show, in rather stark terms, that the percentage of minority teachers in the New York City public schools is less than one-half of what one would expect to find, if New York City were to "behave" like other cities.

This result, in and of itself, does not constitute proof of discrimination. It does indicate, however, that the percent of minority teachers in the public school system of New York City is far lower than it should be, given the available pool of minority college graduates

in New York City and the characteristics of the New York City labor market.

(2) *Minority teachers are channeled into elementary and junior high schools in a manner that corresponds to the racial composition of the schools.*

This finding comes as no surprise since these results were anticipated by the state legislature when it mandated that teachers hired through the alternative method (NTE and "out of rank order" teachers) be restricted to elementary and junior high schools having high concentrations of educationally disadvantaged pupils.

(Emphasis in original.)

6. The district court granted numerous motions to intervene, including those of the UFT, the CSA, several community school boards, the Coalition of Concerned Black Educators, several black teachers represented by the NAACP, Ronald Ross (a black teacher represented by the New York Civil Liberties Union), the Public Education Association, and the American Civil Liberties Union.

7. The district judge stayed his order for 14 days to give appellants an opportunity to appeal.

8. The March 15 order was certified in accordance with 28 U.S.C. § 1292(b). This court granted petitions for leave to appeal and cross-appeal and consolidated the appeal from the March 15 order with the appeal from the February 24 order.

9. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

10. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. § 2000d.

11. 45 C.F.R. § 80.3(c)(3), which deals with the relationship between 42 U.S.C. § 2000d and 42 U.S.C. § 2000d-3, provides:

> Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and non-discriminatory treatment of, beneficiaries.

12. OCR has authority to collect racial data in school systems under the Emergency School Aid Act as well. *See* 20 U.S.C. § 1605(d)(1); 45 C.F.R. § 185.13(*l*); *Board of Education v. Califano*, 584 F.2d 576 at 582-585 (2d Cir. 1978).

13. Each agency that maintains a system of records shall—

> (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President[.]

5 U.S.C. § 552a(e)(1).

14. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 1751; *cf. Darville v. Dade County School Board*, 497 F.2d 1002, 1004-05 (5th Cir. 1974) (20 U.S.C. § 1651, which is identical to 20 U.S.C. § 1751, does not foreclose school assignment plans voluntarily adopted by school board which exceed constitutional minimums and the means, such as transportation, to carry out the plan).

15. Cross-appellants contend that the district court erred in raising and deciding a claim for relief not made by any party on the ground that there was no case or controversy. Since none of the parties except CSA raised any procedural question and since CSA itself did not specifi-

cally seek the remand to HEW which the district court ordered, cross-appellants argue that the propriety of the remand has not been presented in an adversary context. *See O'Shea v. Littleton*, 414 U.S. 488, 493, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 423, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (Marshall, J.); *Flast v. Cohen*, 392 U.S. 83, 96-97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). We are persuaded, however, that the requisite case or controversy exists. Even though CSA did not in haec verba request the district court to remand the case to HEW, CSA did ask that the memorandum be held illegal for not permitting its participation; and CSA was careful to pray for such relief as the court deemed proper. *See Robinson v. Lorillard Corp.*, 444 F.2d 791, 802-03 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007, 92 S.Ct. 573, 30 L.Ed.2d 655 (1972); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2664, at 108-09 (1973); Fed.R. Civ.P. 54(c). In addition, at this stage in the proceedings, CSA has explicitly argued that the remand to HEW was proper. Consequently, the district court had and this court has jurisdiction to decide the question of the remand to HEW.

16. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

17. *See* note 10 *supra*.

18. If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

45 C.F.R. § 80.8(a).

19. Congress's intent that HEW use voluntary means to secure compliance with Title VI before resorting to fund termination is clear. Senator Humphrey stated that

> [t]he first step, in all cases, will be advice to the appropriate person or persons and a reasonable effort to secure voluntary compliance. Obviously no hearing is required in connection with such efforts at voluntary compliance.

110 Cong.Rec. 8979 (1964). And Senator Ribicoff added:

> The agency could not immediately cut off the funds. As I view this matter, I hope that in the case of every agency and every county involved the officials of the agency would sit down with the officials of the county and would try to settle the problems voluntarily, before any action would be taken, including action to cut off funds, which would be the last resort.

110 Cong.Rec. 13129 (1964).

20. (c) . . . No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the

committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. . . .

(d) . . . No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. § 80.8(c)–(d).

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. . . . An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver . . . .

(b) *Time and place of hearing.* . . . Hearings shall be held before a hearing examiner . . . .

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in con-

formity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence . . . .

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

* * * * * *

45 C.F.R. § 80.9(a)–(d).

21. (d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1).

22. *See Board of Education v. Califano, supra.*

23. *See* Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667, 1772–73 (1975).

The resource and delay costs of formal proceedings are incurred by the agency as well as private parties and may seriously undermine the effective discharge of agency responsibilities. These burdens will mount as previously informal decisions on enforcement policies are subjected to formal processes of resolution. Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions. Moreover, formal trial-type proceedings in many contexts may be inferior to informal negotiations as a means of agency dispute resolution and decision-making. The complex scientific, technological, social and economic issues presented in so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size "varies inversely with [their] usefulness." Judicialization of agency procedures and the expansion of participation rights may also aggravate the tendency for the agency to assume a passive role, focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests presented.

(Footnotes omitted.)

80-1107

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, JOSEPH CALIFANO, JR., DAVID TATEL, RONALD ROSS, THE COALITION OF CONCERNED BLACK EDUCATORS, and GORDON AMBACH,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

(1) Did the Court of Appeals err in affirming the District Court's dismissal of appellants' case on the ground

that in its present posture, the case does not present a "case or controversy" under Article III of the Constitution?

(2) Did the Court of Appeals err in holding that the Department of Health, Education and Welfare ("HEW") has jurisdiction under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 to investigate the Board of Education's teacher and supervisor employment practices and to seek compliance with the provisions of these statutes?

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REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition.

The petition presents the following questions:

> 1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?
>
> 2. In the absence of a finding that the Board intentionally discriminated racially against Black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's

> actions in carrying out its provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?
>
> 3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due process of law?

None of the questions cited above were decided by the Second Circuit in its decision in this case filed on September 22, 1980. Moreover, the record in this case will not support a determination of these questions by this Court.

Jurisdiction

(1) In the first part of its opinion, entitled "Jurisdiction," (Pet. 9a), the Second Circuit held that "Title VI enforcement procedures apply to the Board's teacher hiring and assignment practices and

that HEW therefore had jurisdiction to investigate and seek compliance."

Not only was there no finding that OCR "required" the Board of Education to agree to the terms of the Memorandum of Understanding, but both the District Court and the Circuit found that the Memorandum was voluntary. Also, neither the District Court nor the Circuit Court found any of the provisions in the Memorandum to constitute "racial quotas."

The Absence of a Finding of Intentional Discrimination

(2) In the second part of its opinion, entitled "teacher assignment," (Pet. 11A-14A), two of the three judges hearing this case in the Circuit held that appellants' challenge of the assignment remedy required by the Memorandum failed, on the record presented, to allege any harm

amounting to violation of a federally protected right, and never even reached the issue of whether the race-conscious remedies provided for in the Memorandum can be upheld in the absence of a prior finding of intentional discrimination.

In Part 3 of its opinion, entitled "hiring goals," (Pet. 14a-15a), the Second Circuit held that appellants

> "claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a 'case or controversy' under Article III of the Constitution. No teacher has alleged that the Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is 'real and immediate," rather, it is 'conjectural' and 'hypothetical."

Because the record was found deficient in these respects, the Second Circuit

did not reach the second question presented by appellants, the issue of whether the absence of a finding of intentional discrimination invalidates the Memorandum.

Ethnic Census

(3) The Second Circuit decision which appellants are asking this Court to review made no findings with respect to the Board's collection of statistics on the ethnic and racial composition of the teaching staff. In Caulfield I, 583 F. 2d 605, (2d Cir., 1978), the Second Circuit held that the District Court "did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors," (Pet. 18A), and affirmed the District Court's order of February 24, 1978, denying plaintiffs' application for an injunction against the collection of such data. In affirming the

District Court's order in the prior proceeding, the Circuit noted that "since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law." (Pet. 23A)

Upon the remand of this case to the District Court for a trial on the merits, appellants failed to introduce any evidence whatsoever on the racial census conducted by the City School system, and accordingly, the Circuit, in the decision which appellees seek review, made no findings on this issue. For this reason, we respectfully submit that the question of the alleged harm caused by the racial census is not properly before this Court for review.

CONCLUSION

This is a case of a record that fails to demonstrate any invasion of petitioners' constitutional or statutory rights and therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1107

IN THE

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OCTOBER TERM, 1980

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Petitioners,

—v.—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FILED IN BEHALF OF RESPONDENT RONALD ROSS.

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QUESTIONS PRESENTED

In the argument set forth infra pp. 21-39 respondents explain why this case presents no issue over which the Court should extend its discretionary review. It is respondents' position that the questions presented for review are without legal merit and that the questions, as framed by the petitioners, assume facts that are plainly at odds with the record in this case.

Because the questions, as framed by the petitioners, are inconsistent with the record, respondents have recast petitioners' questions to more accurately reflect the reality of the instant record. Even, in their recast form, respondents believe that the issues generated do not warrant review by this Court, as petitioners' position remains without merit.

Nevertheless, to comport with the record in this case petitioners' questions must be

recast as follows:

1. Where, as the courts below found, a Board of Education's racially discriminatory teacher appointment and assignment practices have an injurious effect upon the school-children's educational environment, and where the available data suggests that a primary purpose of federal funding to a school system is devoted to employment, does 42 U.S.C. 2000d-3 bar the Office for Civil Rights from investigating and attempting to correct such discriminatory practices?

2. Did the courts below err in concluding that the Office for Civil Rights reasonably identified and reasonably sought to remedy violations of Title VI that it and the Board of Education thought in need of remediation?

3. Where, as here, the Board of Education collected ethnic data, pursuant

to the mandate and to effectuate the purposes of Title VI and Title VII of the 1964 Civil Rights Act, were the instant petitioners deprived of any constitutional rights of privacy, liberty or due process?

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

In chronological order, the opinions in the courts below appear as follows: Caulfield v. Board of Education (Caulfield I), 449 F. Supp. 1203 (E.D.N.Y. 1979); Caulfield v. Board of Education (Caulfield II), 583 F. 2d 605 (2nd Cir. 1978); Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862 (E.D.N.Y. 1979); Caulfield v. Board of Education (Caulfield IV), 632 F. 2d 999 (2nd Cir. 1980).

STATEMENT OF THE CASE

In November 1976, after conducting an extensive investigation[1] into New York City's teacher hiring practices, the Office for Civil Rights (OCR) of the U.S. Department of Health, Education and Welfare, found "that the New York City school system [was] in non-compliance with Title VI of the Civil Rights Act of 1964" with respect to its teacher appointment and assignment policies. (See November 9, 1976 report from then-OCR Director Martin Gerry to then-Board of

---

1/ Respondents Ross and Coalition of Black Educators were among the complainants that filed an administrative complaint with OCR charging the Board of Education with racially discriminatory practices. These administrative complaints were among the factors that precipitated OCR's review of the Board's student and teacher assignment practices.

Education Chancellor Irving Anker; See Caulfield v. Board of Education(Caulfield III), 486 F. Supp. 862, 867 (E.D.N.Y. 1979).

Upon identification of racially discriminatory practices, OCR is obligated by statute (42 U.S.C. 2000d-1) and by regulation (45 C.F.R. 80.7(d); 45 C.F.R. 80.8(a)) to attempt to secure voluntary compliance with Title VI "by informal means [if] possible." 45 C.F.R. 80.7(d). OCR's pursuit of its statutory mandate was successful in this case. And on September 7, 1977, OCR and the New York City Board of Education entered into a voluntary compliance agreement,[2/] which sought to rectify the segregative and discriminatory practices with respect to the appointment and

2/ The parties to the agreement referred to it as a Memorandum of Understanding. Accordingly, that description of the agreement appears in this brief and throughout the record in this case.

assignment of New York City public school teachers. It is that voluntary compliance agreement which has been challenged in the instant lawsuit by petitioners.

OCR's findings, with regard to New York City's teacher hiring practices, were reinforced by a number of earlier investigations that reached similar conclusions. For example, many of OCR's findings substantiated earlier judgments reached by the New York City Commission on Human Rights.[3/] The Human Rights Commission had

3/ See "Conclusions and Recommendations of the New York City Commission on Human Rights" in Tractenberg, ed., Selection of Teachers and Supervisors in Urban School Systems--Hearings Before the New York City Commission on Human Rights (Agathan: 1972), Respondent Ross' Exhibit 107 at trial. (At trial, all exhibits preliminarily marked pursuant to the pre-trial order were deemed admitted subject to any objection that any party may have had. Those exhibits to which no objections were made were admitted without the court passing upon the exhibits. Accordingly, references to exhibits in this brief cannot strictly comply with the requirements of Rule 34.5).

concluded that the system by which professional personnel were licensed and hired by the New York City Board of Education discouraged minority teachers from applying for positions and discriminated against those that did apply. Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862, 893 (E.D.N.Y. 1979). The Commission recommended major reforms with respect to the Board of Education's hiring practices.

The recommendations of the New York City Commission on Human Rights were not new. Indeed, going back to 1951 at least seven studies of the Board's practices were undertaken by independent commissions, agencies and management-consulting firms. Each of these studies recommended either substantial reform or total abolition of New York City's teacher licensing procedures. As the District Court

below found, "a chief reason for this criticism has been that the procedures tended to discourage minority teachers from applying and to screen them out." Caulfield III, supra.

Prior to the OCR investigation, the Board's appointment practices were also criticized by the New York courts. And some significant self-criticism occurred within the Board of Education itself. Thus in In re Skipwith 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958), Judge Justine Wise Polier reviewed the Board of Education's teacher assignment practices and found the Board of Education guilty of discrimination with respect to such practices. Judge Polier noted that there was a "city-wide pattern of discrimination against [minority schools] as compared to [white schools]: A far

greater percentage of positions in the [minority] schools were not filled by regularly licensed teachers." Id at 867-68. The Court further concluded:

> "That the Board of Education is entirely responsible for the existing discrimination in teacher assignments, there is, in my opinion, not the slightest doubt. What the Board did was to let the teachers themselves establish the discriminatory process...Having put the power of assignment in the hands of teachers by default, as far as their choosing or not choosing to teach in [a minority] school...the Board is bound by the acts of its servants." (180 N.Y.S. 2d at 871, 872)

Despite specific remedial suggestions that were advanced by Judge Polier in 1958, some seven years later, the situation apparently remained uncorrected. For the Board, in a "Statement of Policy Excellence for the Schools in New York City" (April 28, 1965) (Defendant Board Exhibit 28), recognized the continuing need for

remediation. The Board announced:

> "In order to insure excellence of instruction in all schools, the talents of the staff must be spread so as to reach all schools. This requires a procedure for guaranteeing a fair share of experience and competence in every school. Since voluntary movement of the staff has not resulted in such equitable distribution, the Superintendent has been directed to prepare a plan for the assignment of experienced teachers to be put into effect in September 1966...." Caulfield III, supra at 890.

In 1966, however, a census of the racial distribution of teachers was undertaken which, according to the District Court, found a substantially disproportionate distribution of black teachers. The census report found that black teachers were concentrated in districts that had the highest percentage of black students; and districts with large white student populations were

found to have virtually no black teachers. The census report recommended aggressive Board of Education action in an effort to integrate the teaching staffs. Ibid.

There is no evidence that any firm integration effort was ever undertaken. And, in this regard, Judge Weinstein was forced to observe, in the District Court below, that "as far as can be determined from the record, no steps which would have involved compulsory transfer of teachers either to improve experience or racial distribution was ever implemented." Ibid.

Thus OCR's investigation[4/] had been preceded by a long history of criticism and

4/ The investigation was explicitly based upon OCR's concern about the effect that discriminatory teacher hiring and assignment practices had upon minority school children. Caulfield v. Board of Education [Caulfield IV], 632 F. 2d 999, 1005 (2nd Cir. 1980).

concern with New York City's teacher hiring practices. Those concerns had lead to a series of administrative and judicial findings of discrimination regarding those practices. OCR's investigation reconfirmed these earlier concerns and findings. In the November 9, 1976 report issued by OCR Director Martin Gerry, the federal agency concluded that the Board of Education was excluding minority school teachers from the school system and segregating the relatively few teachers that were hired. Thus OCR found that Title VI had been violated inasmuch as the Board of Education had

> "...assigned teachers... in a manner that has created, confirmed and reinforced the racially and/or ethnic identifiability of the system's schools; and assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students."
> Caulfield III, supra at 867.

In response to the November 1976 findings by OCR, the Board of Education replied by formal letter of April 22, 1977 denying any intention to discriminate but offering to rectify certain practices. After reviewing its findings and the Board's April 22 response, OCR confirmed its findings in a letter and memorandum to the Board, dated July 6, 1977. Caulfield III, supra at 868.

The Board's formal letter of April 22, 1977 to OCR was not its only response to the allegations made in the November 1976 OCR report. Shortly after receipt of the OCR report, the Deputy Chancellor of the Board of Education, Bernard Gifford, was asked by Chancellor Anker to serve as chairman of an internal committee to review and evaluate OCR's specific findings. Accordingly, Deputy Chancellor Gifford undertook, on behalf of the Board of Education, a self-searching, six month review of the Board's

hiring and assignment practices. The Gifford study confirmed the conclusions of OCR in every material respect. See Office of the Deputy Chancellor, Race, Ethnicity, and Equal Employment Opportunity: An Investigation of Access to Employment and Assignment of Professional Personnel in New York City's Public Schools (N.Y.C. Board of Education, June 1977) Caulfield III, supra at 867-868.[5/]

Thus, by August 1977 both OCR and the Office of the Deputy Chancellor of the Board of Education had apparently concurred in their identification of Board policies and practices that were resulting in the substantial exclusion of minority teachers from

5/ Among the statistics examined by the Deputy Chancellor was the following remarkable set of comparative figures. The percentage of minority teachers in the Los Angeles school system for the 1974-1975 academic year was 31.1%, in the Chicago school system it was 43.2%, in Philadelphia it was 40.2% and in Detroit it was 50.6%. In the New York City school system the percentage of minority teachers was 13.2%. See Gifford Report at p. 4.

the school system as a whole and that were causing the relatively few minority teachers who were employed to be segregated in "minority" schools. A September 1977 agreement between OCR and the Board of Education sought to reform those policies and practices. It called upon the Board of Education to undertake efforts to eliminate the substantial exclusion of minority teachers from the school system as a whole and to desegregate minority personnel within the entire system.

With respect to policies and practices that had resulted in a segregated faculty, the agreement called for measures to insure that by September 1979 "the teacher corps of each District will reflect, within a range of five percent, the racial-ethnic composition of the teacher corps as a whole for each educational level and category, subject only to educationally based program

exceptions." (¶2 of the Memorandum of Understanding.) Similar goals were to be achieved within each individual school by September 1980. Caulfield III, supra at 868.

With respect to practices that had resulted in the substantial exclusion of minority teachers from the school system, the agreement contemplated a variety of affirmative action devices such as minority recruitment and it also called upon the Board of Education to support state legislation that would abolish the use of rank-order examination lists and that would require that the licensing examinations be properly "validated" and "job-related" before they could be used. (See ¶4 of the Memorandum of Understanding) Caulfield III, supra. The agreement also contemplated a set of goals and timetables with respect to the employment of minority teachers. The

goals were to be established on the basis of a labor pool analysis that was to be undertaken in the future. (See Memorandum of Understanding, ¶6). Caulfield III, supra at 869. And the Board further committed that, "[t]hrough the adoption and implementation of the affirmative action procedures and legislation...the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant labor pool." (See Memorandum of Understanding, ¶6) Ibid.

In October 1977 petitioners filed suit in the United States District Court, Eastern District of New York, challenging the legality of the Memorandum of Understanding. Petitioners argued that under §604 of the Civil Rights Act, 42 U.S.C. §2000d-3, OCR was without authority to inquire into the

Board's teacher appointment practices. Petitioners also asserted that the Board of Education had not violated Title VI of the 1964 Civil Rights Act and that, therefore, the attempt to remedy that perceived violation pursuant to the September 1977 compliance agreement represented unconstitutional "reverse discrimination."

In a claim not necessarily related to the legality of the Memorandum of Understanding the petitioners also sought to enjoin the collection of ethnic data for the annual civil rights surveys which the Board of Education undertakes on its own behalf and on behalf of the State of New York and the federal government.

In an order entered on February 23, 1978, petitioners' application for a preliminary injunction with respect to the collection of ethnic data was denied by District Judge Jack B. Weinstein. In March,

1978, the District Court expressed the view that constitutional due process rights had been violated by the failure of OCR and the Board of Education to afford other persons who may have been affected by the Memorandum of Understanding, to fully participate in the administrative proceedings that led to the execution of the September 1977 agreement. Accordingly, the District Court, entered summary judgment, sua sponte, which judgment vacated the Memorandum of Understanding and remanded the entire dispute to the Department of Health, Education and Welfare with directions that public hearings be held. Caulfield v. Board of Education (Caulfield I), 449 F. Supp. 1203 (E.D.N.Y. 1979).

In September 1978, the Court of Appeals ruled that District Court had not erred in denying plaintiffs' motion for a preliminary injunction regarding the collection of ethnic

data. In the same opinion the appellate court reversed Judge Weinstein's decision to vacate the Memorandum of Understanding. Caulfield v. Board of Education (Caulfield II), 583 F. 2d 605 (2nd Cir. 1978).

During the spring of 1979 an extensive bench trial was conducted by Judge Weinstein, at the conclusion of which the District Court rejected all the claims advanced by the plaintiffs and intervenor-plaintiffs. Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862 (E.D.N.Y. 1979). On appeal, the Court of Appeals affirmed the judgment of the District Court. Caulfield v. Board of Education (Caulfield IV), 632 F. 2d 999 (2nd Cir. 1980).

SUMMARY OF ARGUMENT

The questions presented for review by the petitioners are without legal merit and assume facts that are plainly at odds with the record in this case. Petitioners claim that Section 604 of the 1964 Civil Rights Act bars OCR from inquiring into New York City's teacher assignment and appointment practices. This claim is inconsistent with the decision of this Court and of every Circuit Court that has considered the matter. It is also inconsistent with the findings reached by the District Court below to the effect that systemic, racially discriminatory employment practices regarding New York City's teachers were resulting in discrimination against New York's City's school children. Moreover, petitioners reliance upon Section 604 rests upon

the factual proposition that "a primary objective of the federal financial assistance [to the New York City school system] is not to provide employment." Yet, if any conclusion can be drawn from the evidence introduced in this case, it is that a primary purpose of the federal funding, at issue here, is devoted to employment. Thus petitioners' claim that Section 604 bars OCR from reviewing and rectifying New York City's segregative and discriminatory hiring practices is without legal merit, and in any event, cannot be advanced on the factual record in this case.

Petitioners are similarly foreclosed by the instant record from characterizing this case as one involving the implementation of race-conscious remedies in the absence of prior findings of discriminatory practices.

Findings reached by OCR, by the New York City Commission on Human Rights, by a state court, and by several other agencies, confirmed the conclusion that the Board of Education was engaged in racially discriminatory practices in violation of Title VI as well as the Fourteenth Amendment. These findings were arrived at prior to the conclusion of the Memorandum of Understanding at issue here.

Petitioners objection to the collection of ethnic data is unsupported by any decision of this Court or any Circuit Court. Moreover, petitioners claim, in this regard, was factually undeveloped at trial. Therefore, the record in this case does not permit a serious evaluation of the constitutional claims advanced by petitioners with respect to the collection of ethnic data.

REASONS WHY THE WRIT SHOULD BE DENIED

THIS CASE PRESENTS NO ISSUE OVER WHICH THE COURT SHOULD EXTEND ITS DISCRETIONARY REVIEW. THE CLAIMS THAT PETITIONERS ADVANCE TO THIS COURT ARE, IN VARIOUS RESPECTS, UNSUPPORTED BY THE FACTUAL RECORD IN THIS CASE AND WITHOUT MERIT.

A. Petitioners Suggestion That OCR Was Barred By Section 604 Of The 1964 Civil Rights Act From Inquiring Into New York City's Teacher Assignment And Appointment Practices Is Unsupported By The Factual Record And Utterly Without Merit.

Petitioners claim that Title VI enforcement procedures are inapplicable with regard to the Board of Education's teacher assignment and appointment practices. In this regard, petitioners claim that under Section 604 of the Civil Rights Act, employment practices are exempt from Title VI coverage "except where a primary objective of the Federal financial assistance [to the employer] is to provide employment."

42 U.S.C. 2000d-3.

In a variety of contexts, petitioners have repeatedly advanced this claim to the courts below. On three occasions the lower courts have addressed this issue and in all three instances petitioners' assertions, in this regard, were firmly rejected. See Caulfield II, supra at 610-611; Caulfield III, supra at 878-882; Caulfield IV, supra at 1005.

The position taken by the courts below is eminently correct for several reasons: First, systemic, racially segregative and discriminatory practices with respect to the appointment and assignment of teachers have been consistently regarded by this Court, as well as the lower federal courts, as a form of discrimination against students. Thus, in Rogers v. Paul, 382 U.S. 198, 200 (1965), this Court held that allocation of

faculty on a racial basis "denies [students] equality of educational opportunity without regard to segregation of pupils." In Columbus Board of Education v. Pennick 443 U.S. 449, 467 (1979) this Court adopted the Sixth Circuit's conclusion that teacher segregation "deprive[s] black students of opportunities for contact and learning from white teachers and conversely...deprive[s] white students of similar opportunities to meet, know and learn from black teachers."

Accordingly, in United States v. Jefferson County Board of Education, 372 F. 2d 836, 883 (5th Cir. 1966) cert. denied sub. nom. Caddo Parish School Board v. United States 389 U.S. 840 (1967), the Fifth Circuit extensively considered the precise issue involving the scope of Section 604 and declared:

> "The defendants contend that this section bars any action requiring desegregation of faculties and school personnel....

> § 604 was never intended as a limitation of desegregation of schools. If the defendants' view of §604 were correct, the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty, it will always have a Negro student body." 372 F. 2d at 882-83.

The Fifth Circuit concluded that Section 604 "was not intended as a statutory bar to faculty integration in schools receiving federal aid." Id at 882. See also Otero v. Mesa County Valley School District, 568 F. 2d 1312, 1314 (10th Cir. 1977). In the face of decisions in this Court as well as the Second, Fifth, Sixth and Tenth Circuits supporting this view, petitioners have cited no cases to the contrary.

The legal proposition advanced by the Fifth Circuit in the Jefferson County case is reinforced by the particular factual record in this case. At the trial systemic,

racially discriminatory employment practices regarding New York City's teachers were shown, as a factual matter, to result in discrimination against students (See testimony of Dr. Kenneth Clark, Trial Transcript at 1798-1799, 1804-1805, 1836, 1839-1841) and the District Court below reached extensive findings with respect to this matter. Where, as here, strong evidentiary support is provided for the proposition that a segregated faculty is causing discrimination against students, Section 604 cannot be said to bar the federal supervisory agency, OCR, from reviewing and rectifying such discriminatory practices. Caulfield III, supra at 880-882.

Yet another reason for supporting the position taken by the courts below with respect to this issue turns upon a somewhat different factual ingredient in this case.

Petitioners alleged in their complaint and claim now that a primary purpose of the federal funding to the New York City Board of Education was not to provide employment. Yet, remarkably, at the extensive trial conducted below, petitioners introduced no evidence on this issue. Intervenor-plaintiffs did introduce certain limited documents[6/] with respect to this matter. But, from the

6/ Those documents (intervenor-plaintiffs' exhibits 212 and 213, at trial) contain New York City Board of Education resolutions accepting federal funds for the fiscal year of 6/76-6/77 as well as an index to those resolutions. An examination of those documents reveals that approximately four of the resolutions also include specific budgets indicating the purposes to which funding is to be put. Of the four specific budgets that are set forth in intervenor-plaintiffs' exhibit 213, employment costs (including salary and fringe benefits) ranged from 69% to 94% of the entire program costs. The majority of remaining pertinent budgetary resolutions simply detail the staff which the federal funding would support, but they fail to provide specific budgets. But even these more general funding resolutions seem to be predominantly used to cover employment costs. That this should be the case is unsurprising in light of the fact that it is well recognized that education is a highly labor-intensive field.

documents introduced by the intervenor-plaintiffs it is possible only to surmise that the purpose to which between 69 and 94 percent of the federal funding is put, is employment. It is thus the case, that if any conclusion can be drawn from the evidence introduced by the intervenor-plaintiffs, it is that a primary purpose of the federal funding, in issue here, is devoted to employment.

In sum, petitioners' claim that Section 604 bars OCR from reviewing and rectifying New York City's discriminatory teacher assignment and appointment practices is without merit, as a matter of law; and, in any event, cannot be advanced upon the factual record in this case.

B. Petitioners Are Foreclosed By The Record In This Case From Characterizing This Case As One Involving The Implementation Of Race-Conscious Remedies In The Absence Of Prior Findings Of Discriminatory Practices.

Petitioners second question is premised upon the factual assumption that the Memorandum of Understanding was not preceded by a finding that the Board of Education had engaged in discriminatory practices in violation of Title VI and the Fourteenth Amendment.[7] That factual assumption is simply inconsistent with the record at bar.[8]

7/ Petitioners second question begins "In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers...."

8/ In an expression of dicta in the Caulfield IV opinion, two of the judges in the Second Circuit panel below appear to share the view that the Memorandum was not preceded by a finding that the Board of Education had engaged in racially discriminatory practices. Caulfield IV, supra at 1006. That view cannot be correct. For as discussed above, it is inconsistent with the facts adduced at trial and with many of the findings reached by the trial court.

In this case, OCR, an administrative agency with the authority, indeed, the responsibility, to investigate racially discriminatory practices affecting New York City's school children, undertook such an investigation. During the course of this investigation, it identified racially discriminatory practices and recited its findings in an extensive report which it sent to the Board of Education in November 1976. And, pursuant to its statutory obligation to seek voluntary compliance with the Civil Rights Act (See 42 U.S.C. 2000d-2), OCR fashioned reasonable remedies in a voluntary effort to rectify the discrimination. Thus, OCR did everything within its administrative authority, consistent with the salutary goals of the Title VI voluntary compliance provisions, to render specific findings as to the Board of Education's discriminatory practices.

Moreover, an examination of the specific findings contained in the November 9, 1976 OCR report and an explanation of those findings provided by the author of the report, Mr. Martin Gerry (See Trial Transcript at pp. 778-779), reveals that the discriminatory practices identified by OCR were violative not only of Title VI but of the equal protection clause of the Fourteenth Amendment.

Indeed, the District Court, after an extensive review of the evidence in this case, concluded that "there was a reasonable belief on the part of the Board and OCR that the Board's hiring and assignment practices were in violation of Title VI... and the Constitution ....[And] these conclusions follow, whether the standard for establishing a violation of Title VI... is an 'effects' standard, or the Fourteenth Amendment 'intent' standard." Caulfield III,

supra at 924.

As discussed above, in the statement of the case, the Memorandum of Understanding was not only preceded by OCR's identification of racially discriminatory practices. Judge Weinstein found in the trial court (Caulfield III, supra at 888-889) and Judge Oakes noted in the Court of Appeals opinion (Caulfield IV, supra at 1005) that the voluntary compliance agreement was also preceded by New York state court findings with regard to New York City's teacher assignment practices and patterns. The judicial findings concluded that the assignment practices and patterns were racially discriminatory. See In re Skipwith, 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958). And, as Judge Weinstein found, those patterns had remained largely uncorrected prior to the conclusion of the

Memorandum of Understanding, Caulfield III at 889.

Moreover, as the District Court also noted, the New York City Commission on Human Rights had, in 1970, conducted extensive hearings with respect to New York City's teacher hiring procedures. Caulfield III, supra at 892. The City Commission had also found those procedures discriminatory. Ibid. And finally Judge Weinstein indicated that since 1951 virtually every commission, agency and consulting firm reviewing the system, pursuant to which New York City teachers were hired, has called for substantial reform or abolition of the system. "A chief reason for this criticism has been that the system tended to discourage minority teachers from applying and to screen them out." Caulfield III, supra at 893.

In sum, these conclusions by the District

Court, with regard to the investigations and findings of OCR, of the Skipwith Court, of the City Commission on Human Rights, and of other agencies and consulting firms, all amply supported by the record in this case, foreclose petitioners present attempt to characterize this case as one involving the implementation of race-conscious remedies in the absence of prior findings of discriminatory practices. In this case, the Memorandum of Understanding was repeatedly preceded by findings to the effect that the Board of Education's teacher hiring and assignment practices were racially discriminatory.

C. Petitioners Objection To The Collection Of Ethnic Data Is Without Merit. Moreover, Petitioners Claim, In This Regard, Was Factually Undeveloped At Trial.

1. Petitioners objection to the collection of ethnic data is without merit.

Federal regulations, enacted pursuant to Title VI and Title VII of the 1964 Civil Rights Act mandate the collection of ethnic data. See 29 C.F.R. 1602.30-1602.37; 28 C.F.R. 42.406 (a); 45 C.F.R. 80.6(b); 45 C.F.R. 80.6(c). It is, of course, well settled that these agency regulations, promulgated to effectuate the important goals of Title VI and Title VII, are "entitled to great weight." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co. 401 U.S. 424, 433-434 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

The collection of ethnic data represents a reasonable, indeed a necessary, procedure to assure the accomplishment of the purposes of Title VI and Title VII. Accordingly, in United States v. New Hampshire, 539 F. 2d 277 (1st Cir. 1976) Chief Judge McEntree wrote for a unanimous court in declaring:

> "The information which the regulations require a state to furnish on the EEO-4 form is essentially raw statistical data which, properly interpreted, can provide an intelligent basis for determining whether the state may be guilty of an unlawful employment practice within the purview of Title VII. [citations omitted] Information like that which the EEO-4 form seeks to accumulate is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context....We have no doubt but that the information sought on the EEO-4 form is both reasonable and fully consistent with the overall purpose of Title VII." Ibid. at 279-280.

In the New Hampshire case, the state had argued, as petitioners here have contended, that the collection of ethnic data should not be required "because the information gleaned from the EEO-4 reports might be misused in a relief program improperly relying on quotes or in a program violative of §703(j) of Title

VII...." (Ibid. at 280.) The First Circuit unequivocally rejected this contention.

The Second Circuit has also quite firmly expressed the view that "the Constitution... does not condemn the collection of ethnic data." Caulfield II, supra at 611. The Caulfield II Court dismissed petitioners claims thusly: "The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals...." Caulfield II, supra at 612.

Petitioners claim, in this regard, is plainly without merit. Indeed, petitioners have not identified any cases which suggest that there can be an arguable question about the matter.

2. Moreover, petitioners claim with regard to the collection of ethnic data was factually undeveloped at trial.

In denying petitioners request for preliminary injunctive relief with regard to the collection of ethnic data, the Court of Appeals in Caulfield II noted, somewhat critically, that petitioners had "neither presented nor sought to present any evidence in support of their motion for a preliminary injunction." Caulfield II, supra at 610.

The constitutional right of privacy can only be evaluated in a particular factual context. Thus if petitioners' constitutional claim, with respect to the collection of ethnic data, had been seriously pursued it would have been vital to present evidence as to how the ethnic data was collected,

how it is retained, and how it is used. Evidence with respect to expectations of privacy and how, if at all, persons were injured by the collection, maintenance or use of ethnic data are also essential to the proper evaluation of this claim. Yet, petitioners presented virtually no evidence with regard to this matter either in conjunction with their motion for preliminary injunctive relief or at trial.[9/]

In sum, though petitioners alleged in the complaint that the collection of ethnic data violated constitutional rights of privacy and though petitioners press

9/ For example, in the petition to this Court, plaintiffs rely upon Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1962) to advance the claim that the collection of ethnic data infringes constitutional rights of privacy. Yet plaintiffs presented no evidence at trial, suggesting that the collection of data chilled or impeded the political associations of any individual.

that claim here, this issue remained factually undeveloped at trial. Accordingly, the record in this case does not permit a serious evaluation of the constitutional claims advanced by petitioners with respect to the collection of ethnic data.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, in the above-styled matter, should be denied.

Respectfully submitted,

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Dated: New York, New York
February 5, 1981

No. 80-1107

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM CAULFIELD, ET AL., PETITIONERS

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Office of Civil Rights of the Department of Health, Education, and Welfare had authority to seek voluntary compliance by the school board to eliminate faculty hiring and assignment practices that subjected students to discrimination in violation of Title VI of the Civil Rights Act of 1964.

2. Whether the school board's voluntary compliance with Title VI by assigning faculty to reflect at each school the racial composition of the faculty in the system as a whole violates the Constitution.

3. Whether the school board's collection of racial and ethnic data regarding teachers violates the Constitution.

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The opinion of the court of appeals of September 22, 1980 (Pet. App. 1a-15a) is reported at 632 F. 2d 999. The opinion of the court of appeals of September 5, 1978 (Pet. App. 16a-38a) is reported at 583 F. 2d 605. The opinion and order of the district court of August 27, 1979, are reported at 486 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1980. The petition for a writ of certiorari was filed on December 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The subject of this litigation is a Memorandum of Understanding ("Memorandum") signed by the Board of Education of the City of New York ("Board") and the Office of Civil Rights ("OCR") of the Department of Health, Education, and Welfare ("HEW") on September 7, 1977, obligating the Board to change its teacher hiring and assignment practices to remedy discrimination found by OCR in an investigation conducted pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*[1]

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[1] Related litigation stemming from OCR's investigation of the Board's hiring and assignment practices was the subject of this Court's decision in *Board of Education of the City School District of New York* v. *Harris*, 444 U.S. 130 (1979), in which this Court held that discriminatory impact, and not discriminatory intent, is the appropriate standard for determining whether the Board is ineligible for federal funds under the Emergency School Aid Act ("ESAA"), 20 U.S.C. 1601 *et seq.*

The Board subsequently sought ESAA funds for the 1978-1979 school year, and HEW declined to waive its finding of ineligibility because the Board had not eliminated the racially identifiable schools that led to its ineligibility. The Board successfully challenged this interpretation by HEW of the ESAA requirements, *Board of Education of the City School District of the City of New York* v. *Califano*, 464

In a letter dated November 9, 1976, the director of OCR informed the Board that it was in violation of those provisions of Title VI and Title IX prohibiting discrimination on the basis of race, color, national origin, or sex in education programs that receive federal funds (Pet. App. 4a-5a). Specifically OCR objected to the Board's use of racially discriminatory selection and testing procedures for teachers, its assignment of teachers and principals in a pattern that created and reinforced the racial identifiability of the system's schools, and its placement of less qualified and less experienced teachers at schools with high percentages of minority students (*ibid.*).[2] OCR concluded that these practices resulted in discrimination against minority students (Pet. App. 10a, 23a-24a), and, as required by 42 U.S.C. 2000d-1,[3] it sought to bring the Board into compliance with Title VI by voluntary means. Ten months of negotiations

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F.Supp. 1114 (E.D. N.Y. 1979), and the court of appeals affirmed. *Board of Education of the City School District of the City of New York* v. *Harris*, 622 F. 2d 599 (2d Cir. 1979). The United States' petition for certiorari in that case in *Hufstedler* v. *Board of Education of the City School District of the City of New York*, No. 80-624, was denied on January 26, 1981.

On February 21, 1980, in a second suit seeking ESAA funds for the 1977-1978 school year, the district court entered an injunction against distribution of the funds pending HEW's reconsideration of the Board's request for a waiver of ineligibility. *Board of Education of the City School District of the City of New York* v. *Harris*, No. 79 C 3233 (E.D. N.Y. (Feb. 21, 1980)), aff'd, No. 80-6050 (2d Cir. Feb. 4, 1981).

[2] Petitioners did not challenge in the court of appeals, nor do they contest here, any of the district court's findings with respect to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Accordingly, our discussion is confined to the facts and issues relating to Title VI.

[3] With respect to the termination of federal funds for violation of its non-discrimination requirement, Title VI provides in pertinent part (42 U.S.C. 2000d-1): "[N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."

followed, and on September 7, 1977, the Board and OCR agreed to the Memorandum of Understanding (Pet. App. 5a).

The Memorandum establishes two objectives for the Board in assigning faculty: (1) by September 1979 the teacher corps of each of the 32 districts in the system was to reflect, within a range of 5%, the racial-ethnic composition of the system's teacher corps are a whole; and (2) by September 1980, the faculty at each school was to reflect this same ratio, within a range of 5% (Pet. App. 5a-6a n.5). The Board could justify a failure to meet these goals by showing that the genuine requirements of a valid educational program prevented it from achieving the goal (Pet. App. 6a n.5). In order to implement these provisions, the Memorandum requires the Board to undertake various affirmative measures, including: (1) validation as soon as practicable of all tests used in determining teacher qualifications; (2) merger of old and new teacher eligibility lists without regard to dates of examinations; (3) abolition of rank ordering of persons who passed examinations; (4) implementation of other appropriate affirmative action mechanisms; (5) support for legislation to accomplish these objectives; and (6) identification, as soon as practicable, of the relevant qualified labor pool by race, ethnicity, and sex, and thereafter employment of minorities in teaching and supervisory positions within a range representative of the composition of that pool (*id.* at 6a-7a n.5). In fulfilling its commitment under the Memorandum the Board is not required to lay off any teacher currently employed or to hire any unqualified teacher. A good faith effort suffices for compliance where the Board is unable to meet the goals in the Memorandum (*id.* at 7a n.5).

In October 1977, petitioners sued the Board, OCR, and the State's Commissioner of Education in the United States District Court for the Eastern District of New York, seeking

a declaratory judgment and injunction invalidating portions of the Memorandum as violative of the Fifth and Fourteenth Amendments and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000e-2 (Pet. App. 3a).[4] Petitioners sought a preliminary injunction against the collection of racial and ethnic data by the Board, and the district court denied their motion on March 15, 1978. *Caulfield* v. *Board of Education of the City of New York*, 449 F. Supp. 1203, 1207 (E.D. N.Y. 1978). At the same time the district court set aside the Memorandum and remanded the case to OCR, directing it to conduct hearings in which petitioners could participate. *Id.* at 1226-1227. The court of appeals affirmed the denial of injunctive relief against the collection of racial and ethnic data (Pet. App. 22a-25a), and reversed the district court's order remanding the case to OCR (*id.* at 25a-28a), concluding that HEW, in seeking voluntary compliance with Title VI, had no duty to conduct hearings or to afford petitioners any opportunity for participation in compliance proceedings (*id.* at 26a). The court of appeals remanded the case to the district court for a trial on the merits (*id.* at 28a).

Following a lengthy trial the district court dismissed the complaint on August 27, 1979, rejecting all of petitioners' challenges to the Memorandum. First, the court held that HEW had jurisdiction to investigate the Board's practices under 45 C.F.R. 80.3(c)(3) (1979), a Title VI regulation authorizing oversight of a federal fund recipient's employment practices where those practices have a discriminatory

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[4] Petitioners are teachers, principals and members of local school boards allegedly affected by the Memorandum (Pet. App. 3a; *Caulfield* v. *Board of Education of the City of New York*, 449 F. Supp. 1203, 1207 (E.D.N.Y. 1978)). The district court permitted the United Federation of Teachers, the Council of Supervisors and Administrators and others to intervene as plaintiffs, and permitted the Coalition of Concerned Black Educators, Ronald Ross, the Public Education Association, and the American Civil Liberties Union to intervene as defendants (*ibid.*).

impact upon direct beneficiaries of federal funds, in this case, the students themselves (Pet. App. 9a). OCR had found that the Board's discriminatory faculty hiring and assignment practices deprived minority students of equal educational opportunity by reinforcing the racial identifiability of schools and, in some cases, by placing less qualified or experienced teachers in predominantly minority schools (*ibid.*).

On the merits, the district court determined that the issue was whether the Board and OCR had a reasonable basis for believing that the Board's faculty hiring and assignment practices might result in a judgment of liability, and whether the remedial measures adopted in the Memorandum were reasonable in light of "the perceived liability" (Pet. App. 9a).[5] After a lengthy and detailed review of the evidence as to potential liability and the provisions of the Memorandum, the court upheld it as a reasonable remedial measure, the terms of which did not violate any right of any of the petitioners (*ibid.*).

The court of appeals affirmed the district court's dismissal of petitioners' claims (Pet. App. 15a). It upheld OCR's authority under Title VI to investigate employment practices resulting in discrimination against students and to seek voluntary compliance where it finds violations of that statute (Pet. App. 10a-11a). Judge Oakes, the author of the court of appeals' opinion, affirmed the district court's conclusion that the goals set by the Memorandum of Understanding were reasonable in light of the parties' perception

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[5] In taking this approach the district court found it unnecessary to decide whether the Board s practices would have dictated a finding of discrimination in violation of the Constitution or federal statutes, under either an "intent" standard or an "effects" standard. Accordingly, the court of appeals did not address that question.

of the Board's possible liability under Title VI, Title IX, and the Constitution (Pet. App. 11a-12a). Judge Oakes explained, however, that his colleagues on the panel, Judges Mansfield and Meskill, had a different basis for affirming the district court on this point: their belief that petitioners had failed to show that the Memorandum of Understanding invades a cognizable "liberty or privacy interest" (Pet. App. 13a). At most the Memorandum would affect an individual teacher's expectation of being assigned to a particular school within the system and, in the view of Judges Mansfield and Meskill, that expectation is "not * * * a right protected under Title VI, Title IX or the Constitution" (Pet. App. 14a).[6]

ARGUMENT

The district court and the court of appeals unanimously upheld both the authority of OCR to investigate and take appropriate action under Title VI with respect to faculty hiring and assignments where an impact on students is shown and the authority of the Board to collect racial and ethnic data concerning teachers. The district court and one judge of the court of appeals (joined in the judgment by the other two panel members) upheld the Memorandum of Understanding as a reasonable remedial measure voluntarily undertaken by the Board to eliminate what it reasonably perceived as discriminatory practices without infringing the

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[6] The court of appeals, with Judge Oakes speaking for the entire panel, also affirmed the district court's dismissal of a challenge by petitioner Caulfield to the Memorandum's provision regarding identification of the relevant labor pool and hiring in accordance with it (Pet. App. 14a-15a). Since it is impossible to determine what action, if any, the Board will take with respect to hiring until the labor pool is identified, the court found Caulfield's claimed injury to be purely conjectural (Pet. App. 15a).

Petitioners do not take issue here with the court of appeals' finding that no applicant for employment has alleged injury resulting from the Memorandum's hiring provisions.

rights of any teachers currently in its employ. Contrary to petitioners' contentions, these decisions do not conflict with holdings of this Court, and there are, accordingly, no issues warranting further review.

1. The court of appeals twice rejected petitioners' contention that OCR lacked jurisdiction to enter into an agreement with the Board regarding its faculty hiring and assignment practices because Title VI prohibits employment discrimination only where the primary objective of federal financial assistance is to provide employment (Pet. App. 9a-10a, 23a-24a). See Section 604 of Title VI, 42 U.S.C. 2000d-3. Because most of the federal funds received by the Board are not for the primary purpose of providing employment, petitioners assert that Title VI has no application to the Board's hiring and assignment of teachers.

The court of appeals correctly recognized that in relying on Section 604, petitioners have mischaracterized the nature of OCR's investigation (Pet. App. 23a). On the basis of OCR's charging letter of November 9, 1976, it was apparent to the court of appeals that OCR's concern with discriminatory employment practices "was motivated by the unfortunate effect that these practices exercise on minority schoolchildren" (*id.* at 23a-24a). Since the purpose of the investigation was to alleviate discrimination against minority students and not discrimination against minority teachers as such, the court of appeals correctly concluded that Section 604 has no relevance here, and OCR's actions were a proper exercise of its authority under Section 601, 42 U.S.C. 2000d (Pet. App. 10a).[7] See *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 882-886

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[7] OCR predicated its charges on 45 C.F.R. 80.3(c)(3) (1979), which provides, in pertinent part:

> Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the

(5th Cir. 1966), aff'd en banc, 380 F. 2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

The court of appeals' decision is fully consistent with this Court's decisions recognizing that, quite apart from the harm resulting from segregative student assignments, harm is inflicted on students when faculty assignments match the race of faculty members to the race predominating in the student bodies of the schools to which they are assigned. Thus, in *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965), this Court held that allocation of faculty on a racial basis "denies [students] equality of educational opportunity without regard to segregation of pupils." Moreover, in *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 467 (1979), this Court adopted the Sixth Circuit's conclusion that teacher segregation "deprive[s] black students of opportunities for contact with and learning from white teachers, and conversely * * * deprive[s] white students of similar opportunities to meet, know and learn from black teachers."

The district court and court of appeals correctly concluded that OCR's action in this case was based on its responsibility under Title VI to insure that no beneficiaries of a program receiving federal funds are subjected to discrimination. Accordingly, petitioners' contention that OCR lacked authority to enter into the Memorandum of Understanding with the Board is without merit.[8]

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recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, [the prohibition against discriminatory employment practices] shall apply * * * to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

[8] Petitioners erroneously analogize this case to decisions under Title IX in which some courts have held that OCR has no power to prohibit

2. Petitioners contend that it was unconstitutional for the Board to alter its teacher hiring and assignment practices in accordance with the Memorandum of Understanding absent a finding of intentional discrimination, which petitioners contend is required to prove a violation of Title VI (Pet. 31-47). It is immaterial, however, whether petitioners have correctly identified the appropriate standard of liability under Title VI,[9] because the decision in this case does not depend on an answer to that question.

In the first place, wholly apart from OCR's investigation and findings, this Court's decisions fully support the

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sex discrimination in the employment practices of federal fund recipients where the primary purpose of the grant of federal funds is not to provide employment (Pet. 25). But courts have held that Title IX may reach employment practices where a nexus exists between employment discrimination and discrimination against students who are the primary beneficiaries of federal funds. See *Islesboro School Committee* v. *Califano*, 593 F. 2d 424, 430 (1st Cir.), cert. denied, 444 U.S. 972 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F. 2d 119, 121 n.3 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Seattle University* v. *United States Dep't of Education*, 621 F. 2d 992, 993-994 & n.6 (9th Cir. 1980), cert. granted, No. 80-493 (Dec. 1, 1980).

[9] In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court upheld a finding of a Title VI violation under an "effects" standard where Chinese-speaking students in San Francisco public schools were taught only in English, a practice that deprived them of "a meaningful opportunity to participate in the educational program." *Id.* at 568. In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), four members of this Court concluded that in the context of the use of an explicit racial classification in a medical school admissions policy, the standard of liability under Title VI is the same as that under the Fourteenth Amendment, 438 U.S. at 325, 327 (opinion of Brennan, White, Marshall & Blackman, JJ.), and Justice Powell concluded that, like the Constitution, Title VI prohibits only those racial classifications for which there is no compelling justification. *Id.* at 287 (opinion of Powell, J.). Finally, in *Board of Education of the City School District of New York* v. *Harris*, *supra*, this Court expressly declined to decide the issue whether proof of discriminatory intent is necessary to make out a violation of Title VI. 444 U.S. at 149. In the absence of a decision overruling *Lau*, that case continues to sustain the use of an "effects" standard for determining liability under Title VI.

Board's power to assign a prescribed ratio of white to minority teachers to each school. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court contrasted a federal court's limited power to remedy de jure segregation with a school board's broad power to integrate its schools as a matter of educational policy. After noting that the "judicial powers may be exercised only on the basis of a constitutional violation," *Swann* states, in language that controls this case (402 U.S. at 16):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as a matter of educational policy is within the broad discretionary powers of school authorities * * * .

The *Swann* rationale is equally applicable to faculty assignments, and *Swann* accordingly establishes that any school board can voluntarily adopt an educational policy favoring faculty integration for educational purposes and carry out that policy by assigning prescribed ratios of white and minority teachers to each school.

This Court emphasized the same point again in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971):

> We observed in *Swann* * * * that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.

Nor does it matter that the Board's voluntary adoption of the Memorandum's goals was in response to OCR's investigation and findings. As Justice White observed in a similar context where a claim was made that an explicit use of race as a factor in legislative reapportionment was not the product of reasoned choice but rather was coerced by federal officials, "this otherwise constitutionally permissible plan was [not] rendered unconstitutional merely because New York adopted it to comply with a federal statute." *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 168 n.25 (1977).

Thus, *Swann* fully supports the authority of a school board to adopt a policy of race-conscious, integrative teacher assignments for educational purposes notwithstanding the absence of a finding of intentional discrimination. See *Zaslawsky* v. *Board of Education of Los Angeles*, 610 F. 2d 661, 664 (9th Cir. 1979). In the face of this settled constitutional principle approving voluntary integration plans, petitioners' unsupported assertion that teachers "have a constitutional right to be free from transfer and reassignment solely on the basis of their race" (Pet. 42) must fail.

Moreover, as the district court and one judge of the court of appeals found, the Board's action is also valid as an appropriate means of insuring compliance with Title VI without litigating disputed charges to the bitter end. Title VI expresses a clear preference for voluntary resolution of complaints, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 364 n.38 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ.), by prohibiting the federal government from initiating a Title VI enforcement action "until the department or agency concerned * * * has determined that compliance cannot be secured by voluntary means." 42 U.S.C. 2000d-1. In *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 n.8 (1979), faced with

Title VII's equally strong preference for voluntary compliance, this Court upheld voluntary race-conscious affirmative action by an employer without judicial findings of discrimination and without requiring that the employer be motivated by a reasonable fear of liability under Title VII.

Petitioners' reliance on *Regents of the University of California* v. *Bakke, supra*, is misplaced. Five members of this Court in *Bakke* expressly recognized that a school board could voluntarily adopt a race-conscious integration plan with fixed ratios, even absent a finding of past intentional discrimination. 438 U.S. at 300 n.39 (opinion of Powell, J.); *id.* at 363 (opinion of Brennan, White, Marshall & Blackmun, JJ.). Four Justices approved voluntary efforts to insure compliance with Title VI through race-conscious remedial action without a predicate of judicial findings of intentional discrimination (*id.* at 364 n.38 (opinion of Brennan, White, Marshall & Blackmun, JJ.)), and Justice Powell approved affirmative race-conscious relief in consent decrees even though consent decrees are not founded on any formal findings of discrimination. *Id.* at 302 n.41 (opinion of Powell, J.). Thus, *Bakke* supports the district court's action here.[10]

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[10] In *Bakke*, the effect of the medical school's special admissions policy was to deny some white persons a scarce benefit enjoyed by others—admission to a medical school—solely on the basis of race. By contrast, the assignment goals in the Memorandum here do not deprive any incumbent teacher, black or white, of an opportunity to teach somewhere in the school system, nor do they affect the right of any prospective teacher to seek employment in the school system. Whatever burdens flow from assignment by race are shared by both blacks and whites, and the goals cast no slur or stigma on any racial group. Given these facts, Judges Mansfeld and Meskill found it unnecessary to reach the merits of petitioners' claims because, in their view, petitioners failed to allege any actual harm resulting from the operation of the Memorandum of Understanding.

The district court recognized that if it decided the merits of OCR's charges, it would undermine the statutory preference for voluntary action. Accordingly, it rejected petitioners' invitation to conduct a trial on the merits of OCR's Title VI charges. Instead the court received evidence for the more limited purpose of ascertaining whether the Board had a reasonable basis for believing that the practices at issue might result in liability. On the basis of a detailed factual inquiry the district court answered that question in the affirmative, and petitioners did not urge, nor did the court of appeals hold, that the district court's findings on this issue were clearly erroneous.[11]

In sum, it is not material to the result in this case whether the Board can be found liable for a Title VI violation only upon a finding of intentional discrimination. Under this Court's holding in *Swann*, the Board may assign faculty to

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[11] The record contradicts petitioners' assertion (Pet. 41) that the district court declined to find that the Board intentionally discriminated racially in its hiring and assignment of teachers. In its Conclusions of Law, filed July 17, 1979, the court found that "the statistical and other trial evidence submitted by the federal defendant established a *prima facie* case of racial discrimination in violation of Title VI and the Fourteenth Amendment * * *" (79-6191 C.A. App. at 27).

The marked concentration of minority teachers at minority schools found here by the district court (486 F. Supp. at 908-909) is highly probative on the issue of intent—particularly since "teacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems." *Kelley* v. *Guinn*, 456 F. 2d 100, 107 & n.8 (9th Cir. 1972), cert. denied 413 U.S. 919 (1973). The inference of intentional discrimination is not dispelled by the Board's past explanations that this stark racial assignment pattern resulted from the unwillingness of teachers to teach in minority schools or the desirability of placing minority teachers in predominantly minority schools as role models. See, *e.g.*, *Smuck* v. *Hobson*, 408 F. 2d 175, 185 (D.C. Cir. 1969); *Morgan* v. *Kerrigan*, 509 F. 2d 580, 596 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *United States* v. *School District of Omaha*, 521 F. 2d 530, 538-539 n.14 (8th Cir.), cert. denied, 423 U.S. 946 (1975).

achieve a prescribed degree of racial balance for educational purposes whether or not it has violated Title VI. And under the rationale adopted by the district court, the Board, in agreeing to the Memorandum, needed only a reasonable basis for believing it might be liable for Title VI violations under either an intent standard or an effect standard. 486 F. Supp. at 876-878. Accordingly, the question of which standard applies in a fully litigated case is purely hypothetical and not amenable to review by the Court in this case.

3. As the court of appeals found (Pet. App. 10a, 24a-25a), petitioners' constitutional objection to the collection of racial and ethnic data is wholly without merit. None of the cases cited by petitioner (Pet. 49-50) suggests that such a census is an intrusion into intimate private matters, and the collection of this information is fully consistent with the purpose of laws designed to enforce constitutional guarantees of equal educational opportunity. See *United States* v. *State of New Hampshire*, 539 F. 2d 277, 280-282 (1st Cir.), cert. denied, 429 U.S. 1023 (1976). That issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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